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In The

Supreme Court of the United States

October Term, 1993

EJAY TRAVEL, INC., NANCY DEMBOWSKI, VIRGINIA L. GRANDY, T. SEAN CRUMLISH, ROBERT ALLEN, REGENT INC. OF 15TH STREET d/b/a GIORGIO BRUTINI, LEGXPRESS, INC., PENNSYLVANIA SQUARE CORP., ANTHONY VINCIGUERRA, JOHN M. CORCORAN, SUNSHINE PERSONNEL, INC., ROYAL BANK OF PENNSYLVANIA, ROBERT J. ATLEE, C.W.D. ENTERPRISES, INC., d/b/a CHRIS' CAFE AND BAR, THE HAPPY ROOSTER, INC. and LINPRO PHILADELPHIA CENTER CITY OFFICE I, LTD.,

Petitioners,

vs.

ALGEMEEN BURGERLIJK PENSIOENFONDS,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Third Circuit erred in construing the third clause of the commercial activity exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2), by holding that Petitioners' cause of action must be "based upon" the commercial activity of a foreign sovereign, instead of being "based upon" an "act" of the foreign sovereign performed "in connection with" the foreign sovereign's commercial activity, as required by the plain language of the statute.

2. Whether the holding of the Third Circuit Court of Appeals is an impermissible interpretation of the third clause of the commercial activity exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a) (2), where this issue has been left open by this Court's decision in *Saudi Arabia v. Nelson*, __ U.S. __, 113 S. Ct. 1471, __ L. Ed. 2d __ (1993).

3. Whether it would work a fraud or injustice in contravention of congressional intent in enacting the Foreign Sovereign Immunities Act to recognize a separate corporate status between the corporation which serves as The Netherlands' general civil pension fund and the paper USA entities it subsequently created to invest in commercial real estate in the United States.

4. Whether the Third Circuit erred and whether Petitioners' Constitutional rights to Due Process were violated by both the district court's and the circuit court's refusal to decide the factual and legal issues in this action relating to the Foreign Sovereign Immunities Act based upon the facts of record in this action instead of upon the admittedly "limited factual findings" and incomplete record from a separate and unrelated litigation to which Petitioners are not a party.

PARTIES TO THE PROCEEDING

The caption of the case in this Court does not contain the names of all the parties. The parties in the circuit court included Plaintiffs/ Appellees Ejay Travel, Inc., Nancy Dembowski, Virginia L. Grandy, T. Sean Crumlish, Robert Allen, Regent Inc. of 15th Street d/b/a Giorgio Brutini, LegXpress, Inc., Pennsylvania Square Corp., Anthony Vinciguerra, John M. Corcoran, Sunshine Personnel, Inc., Royal Bank of Pennsylvania, Robert T. Atlee, C.W.D. Enterprises, Inc. d/b/a Chris' Cafe and Bar, The Happy Rooster, Inc. and Linpro Philadelphia Center City Office I, Ltd. ("Petitioners"), Third Party Defendant/Appellee Honeywell, Inc: and Defendant/Appellant Algemeen Burgerlijk Pensioenfonds ("ABP").

ABP is a Dutch pension fund that is engaged in the business of investing in commercial real estate all over the world. ABP has numerous subsidiaries which it creates around the world to purchase real estate in various countries. ABP created a separate North American Real Estate Division headquartered in Massachusetts to manage its United States real estate investments such as One Meridian Plaza. The subsidiaries that are parties to the instant underlying action, *In Re: One Meridian Plaza Fire Litigation*, in the United States District Court for the Eastern District of Pennsylvania at Civil Action No. 91-2171, *et seq.* ,are USA Holding BV, USA One BV, USA Two BV, US Alpha, Inc., which is a United States corporation, and USA One Associates, which is a Pennsylvania partnership. Additionally, ABP created other paper "USA" entities such as USA Three BV, USA Four BV, USA Five BV, USA Six BV, USA Three Associates and USA Five Associates to purchase other commercial real estate in the United States such as the One Memorial Drive office building in Cambridge, Massachusetts, the Second & Seneca office building in Seattle, Washington, or the Northtown Mall in Minneapolis, Minnesota. Subsequent to the determination by the Third Circuit, a senior tax attorney for ABP testified that US Alpha and ABP's North American Real Estate Division are the same.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	13
I. The Third Circuit's decision is contrary to the plain language of the third clause of the commercial activity exception of the FSIA and is in conflict with decisions from other circuits.	13
II. The interpretation and application of the third clause of the commercial activity exception of the FSIA has never been settled by this Court.	20
III. It would work a fraud or injustice in contravention of Congressional intent in enacting the FSIA to recognize a separate corporate status of ABP and the USA entities.	24

Contents

Page

IV. The Third Circuit failed to consider evidence of record detailing ABP's commercial activity in the United States. 26

Conclusion 29

TABLE OF CITATIONS

Cases Cited:

Antares Aircraft v. Federal Republic of Nigeria, 999 F.2d 33 (2d Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 878 (1994) 19

Berardi v. Swanson Memorial Lodge No. 48, 920 F.2d 198 (3d Cir. 1990) 27

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 14

Cohen v. Beneficial Indust. Loan Corp., 337 U.S. 541 (1949) 1

Colonial Pipeline Co. v. Collins, 921 F.2d 1237 (11th Cir. 1991) 26, 27

Caminetti v. United States, 242 U.S. 470 (1919) 15

First Nat. City Bank v. Banco Para El. Com., 462 U.S. 628 (1983) 24

Contents

	Page
Foremost-McKesson v. Islamic Republic of Iran, 905 F.2d 438 (D.C. Cir. 1990)	27
General Elec. Capital Corp. v. Grossman, 991 F.2d 1376 (8th Cir. 1993)	19
Gibbons v. Udaras na Gaelachta, 549 F. Supp. 1094 (S.D.N.Y. 1982)	15, 19
Gordon v. National Youth Work Alliance, 675 F.2d 356 (D.C. Cir. 1982)	27
Gould, Inc. v. Pechiney Ugine Kuhlman, 853 F.2d 445 (6th Cir. 1988)	27
Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982)	14
Local 336, American Federation of Musicians, AFL-CIO v. Bonatz, 475 F.2d 433 (3d Cir. 1973)	27
Rogers v. Stratton Indus., 798 F.2d 913 (6th Cir. 1986)	27
Saudi Arabia v. Nelson, __ U.S. __, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993)	i, 16, 21, 22, 23
Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 1812 (1993)	19
Southeastern Community College v. Davis, 442 U.S. 397 (1979)	14

Contents

Page

Texas Trading v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982) 17, 19

United States v. American Trucking Association, Inc., 310 U.S. 534 (1940) 14

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) 15

Velidor v. L/P/G Benghazi, 653 F.2d 812 (3d Cir.), *cert. dismissed*, 455 U.S. 929 (1981) 25

Vermuelen v. Renault, U.S.A., Inc., 985 F.2d 1534 (11th Cir. 1993) 18, 19

Statutes Cited:

28 U.S.C. § 1254(a) 1

28 U.S.C. § 1330 3

28 U.S.C. § 1367 3

28 U.S.C. § 1602-1611 1

28 U.S.C. § 1602, *et seq.* ..... *passim*

28 U.S.C. § 1603(d) 1

28 U.S.C. § 1605(a) 3

Contents

Page

28 U.S.C. § 1605(a)(2) ..... *passim*

28 U.S.C. § 1605(5) 3

Rules Cited:

Supreme Court Rules:

R. 10.1 13

R. 10.1(a) 14

R. 10.1(c) 14

Federal Rule of Civil Procedure:

R. 12(b)(1) 1, 26

Other Authority Cited:

H.R. Rep. No. 1487, 94 Cong., 2d Sess. 1, *reprinted* in 1976 U.S. Code Cong. & Admin. News 6604 28

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Third Circuit Filed December 28, 1993 ..... 1a

Appendix B — Memorandum of the United States District Court for the Eastern District of Pennsylvania Dated April 14, 1993 ..... 48a

Contents

Page

Appendix C — Memorandum Opinion and Order of the United States District Court for the Eastern District of Pennsylvania Filed January 26, 1993 ..... 120a

Petitioners respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit, entered on December 28, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 12 F.3d 1270 (3d Cir. 1993) and is reprinted in the Appendix at 1a-47a. The two opinions of the United States District Court for the Eastern District of Pennsylvania are reported at 820 F. Supp. 1460 (E.D. Pa. 1993) and at 1993 U.S. Dist. LEXIS 784 (E.D. Pa. January 26, 1993) and are reprinted in the Appendix at 48a – 119a and 120a– 137a.

STATEMENT OF JURISDICTION

On December 28, 1993, the circuit court reversed an order of the district court which had, *inter alia,* denied Respondent ABP's Rule 12(b)(1) Motion to Dismiss and held that it had subject matter jurisdiction over claims against ABP under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.* (1976) ("FSIA"). Jurisdiction in the circuit court rested upon the "collateral order doctrine." App. at 23a-28a (citing *Cohen v. Beneficial Indust. Loan Corp.*, 337 U.S. 541 (1949)). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(a) (1988).

STATUTORY PROVISIONS INVOLVED

The FSIA, 28 U.S.C. §§ 1602-1611, is at issue in this case. Specifically, Section 1603(d) of the FSIA provides:

> For purposes of this Chapter —
>
> * * *
>
> (d) A "commercial activity" means either a

> regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

In addition, Section 1605(a)(2) provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —
>
> * * *
>
> (2) in which the action is based upon a commercial activity carried on in the United States by a foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

STATEMENT OF THE CASE

This action arises from a deadly fire that occurred on February 23-24, 1991 at One Meridian Plaza, a thirty-eight story commercial office building located in the heart of the commercial district of Philadelphia. The disastrous fire substantially destroyed the thirty-eight story building, resulted in the deaths of three Philadelphia firefighters and caused millions of dollars in damages to the thousands of people and businesses located in and around One Meridian Plaza.

Petitioners brought this action in the Court of Common Pleas of Philadelphia County on March 1, 1991 for themselves, and as a class action for others similarly situated, as a result of, *inter alia,* the gross negligence and intentional misconduct of the owners and managers of One Meridian Plaza, the majority interest of which is controlled by ABP. On April 4, 1991, ABP removed this action to the United States District Court for the Eastern District of Pennsylvania, at *In Re: One Meridian Plaza Fire Litigation,* Civil Actions Nos. 91-2171 *et seq.*, by asserting that it is an agency of The Netherlands central government and that subject matter jurisdiction exists pursuant to 28 U.S.C. §§ 1330 and 1367 and the FSIA.[1]

ABP contends that it is immune from suit under the FSIA. However, the FSIA clearly sets forth exceptions to any such immunity. There are at least two exceptions applicable to ABP. Pursuant to 28 U.S.C. § 1605(a), a foreign state shall not be immune from the jurisdiction of United States courts (1) where the foreign actor carries on commercial activity (a) inside the United States or (b) outside the United States that has a direct effect on the United States or (c) commits any acts outside the United States in connection with commercial activity that causes a direct effect in the United States or (2) where the foreign state causes a tort within the United States. *See* 28 U.S.C. § 1605(a)(2) and (5). *Both of these exceptions are fact specific.* All of these exceptions apply here and all were raised below by Petitioners.

On April 14, 1993, the district court denied ABP's Motion to Dismiss based, *inter alia,* on only one of the three prongs of the

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1. USA Holding B.V. ("USA Holding"), another subsidiary of ABP, was not originally named as a defendant by the Plaintiffs/Petitioners herein at the time that ABP filed its Motion to Dismiss, but was subsequently included as a defendant in this action and was also included as an original defendant in one of the other two cases appealed to the Third Circuit. App. 17a. USA Holding, like ABP, contended that it was entitled to immunity under the FSIA. App. 20a.

commercial activity exception to the FSIA by incorporating by reference an Order entered on January 26, 1993 in another case unrelated to this action but that also arose from the fire, *Federal Insurance Co., et al. v. Algemeen Burgerlijjk Pensioenfond*, E.D. Pa. C.A. No. 92-4177 ("the Federal Insurance litigation"). Unlike in the Federal Insurance litigation, Petitioners in this action asserted all three prongs of the commercial activity exception as well as the tort exception to the FSIA.[2] Both the district court and the circuit court improperly only considered the one prong of the commercial activity exception raised by the plaintiff in the *other* unrelated Federal Insurance litigation in deciding Petitioners' cause of action against ABP in *this* action.

Both the district court and the Third Circuit erroneously did not review the record in this action in actually deciding this action, but applied the admittedly "limited factual findings" made by the district court in the unrelated Federal Insurance litigation to the instant action, *In Re: One Meridian Plaza Fire Litigation:*

> Second, the only factual findings made by the district court in denying all three motions were those set out in the Federal Insurance litigation opinion. Thus, we base our review on those limited factual findings made by the district court in the Federal Insurance litigation opinion. With these conclusions in mind, we turn to the arguments made concerning the scope of the records on appeal.
>
> * * *
>
> Turning to the matters raised in this appeal, *we will decide the Federal Insurance litigation*

2. The other cases on appeal before the Third Circuit have since settled.

> *case only* on facts contained *in that record.* Since we will reverse the district court's order in that case solely on its interpretation of the law, on remand it is for the district court to determine whether the factual record is sufficient for it to rule on other jurisdiction theories. We decline Honeywell's invitation to consider evidence that was discovered in the class action litigation but that was not relied upon by the district court in denying ABP's motion to dismiss in that case.

App. 31a and 32a (emphasis added; footnote omitted). Furthermore, the Third Circuit noted that, although it could take judicial notice of the additional facts of record in this action, it believed that doing so would "not *assist* our *limited review*" since it was *only* reviewing the district court's "*interpretation of law as articulated in the Federal Insurance litigation opinion.*" App. 32a (emphasis added).

On appeal, the Third Circuit also indicated that it believed that the tort exception was the more appropriate means to assert jurisdiction:

> These claims are primarily tort claims – allegations phrased in terms of negligence, gross negligence, recklessness, nuisance and strict liability that the defendants breached various duties and standards of care with respect to maintaining electrical and fire detection systems, inspecting the building, and failing to warn plaintiffs, among many others. These claims are not "based upon" USA Holding's sole commercial activity of forming two Dutch subsidiary corporations that

> eventually invested in One Meridian Plaza through a U.S. subsidiary. The plaintiffs would not need to prove that USA Holding formed two wholly-owned Dutch subsidiaries to invest in U.S. real estate in order to prevail on their tort claims.

App. 41a (emphasis added; footnote and citation omitted). However, it is the commercial activity exception which both Congress and this Court intended to apply to the facts of record in this action.

As shown below, this Court should grant certiorari to review the Third Circuit's decision because it, *inter alia*, erroneously failed to consider the first and second clauses of the commercial activity exception to the FSIA and because it improperly rewrote the plain language of the third clause of the commercial activity exception of the FSIA to require that a claim be based upon the commercial activity itself, rather than upon an act "in connection with" the commercial activity. This Court should also grant certiorari to review the Third Circuit decision with respect to the commercial activity exception because the decision conflicts with decisions in the Ninth and Eleventh Circuits.

ABP's pre-acquisition activity and "due diligence" of One Meridian Plaza. In or around February 1988, ABP determined to invest in the commercial real estate market in the United States. Long before its purchase of a 65% interest in One Meridian Plaza through paper "USA" subsidiaries, ABP engaged in extensive commercial activity in the United States while searching for suitable commercial real estate investments to add to its worldwide commercial real estate investment portfolio. The highest level of ABP executives repeatedly travelled to the United States during this extensive negotiation and due diligence process.

ABP even created a North American Real Estate Division of ABP headquartered in Massachusetts to manage its United States real estate investments such as One Meridian Plaza; this is a *division* of ABP engaged in commercial activity in the United States and is *not* a separate corporate entity. ABP hired agents, accounting firms and law firms in the United States to act as intermediaries and advisors in the United States. During this financial evaluation process, ABP performed various financial appraisals and analyses and projected that its investment would produce a profit of over $188 million in fifteen years.

After over a year of negotiation and due diligence, ABP determined to buy a 65% interest in One Meridian Plaza and "*ABP . . .* agreed to this transaction *subject to* the same *committee approval in Heerlen.*" Prior to purchasing the Building, an "ABP Team," including the former President of ABP, other top executives of ABP and a "mechanical person," thoroughly inspected the Building. During this time, which was over the course of more than a year, neither USA One Associates, which is a Pennsylvania Partnership, US Alpha, the management entity which is a United States corporation, the holding corporation, USA Holding, nor USA One and USA Two, even existed. These entities were created by ABP on April 14, 1989, *after* ABP performed its "due diligence," *after* it decided to buy a majority interest in the Building in February 1989, *after* a year of business negotiations, and solely for the purchase of acquiring an interest in One Meridian Plaza pursuant to ABP's "general policy" to create separate entities for its investments. Prior to the creation of these paper "USA" entities, ABP notified its United States agent:

> On February 10, 1989, *the Investment Committee of Abp* agreed in principal with the revised structure of the transaction as discussed in Philadelphia on February 1 and 2 1989 and has given a positive recommendation

> to the *Board Abp, which has to take the final decision,* it being understood that:
>
> 1. *Abp will purchase* a 65% interest in the Three Mellon Partnership [One Meridian Plaza] at a purchase price of US $120,250,000 (65/100 x US $185,000,000). The remaining 35% partnership interest will stay with Equitable Life Insurance Society and Richard I. Rubin Company (hereinafter "E/R").

(Emphasis added).

ABP purchased a majority interest in One Meridian Plaza and immediately had a financial incentive to increase rental proceeds and decrease expenditures to keep its unsecured loan current. On April 14, 1989, ABP created USA One and USA Two, which are general partners in USA One Associates, which is a Pennsylvania partnership that was created to obtain a fee interest in One Meridian Plaza. These paper "USA" subsidiaries are a sham. There are no employees of USA One Associates. There are only ten shares in USA One and ten shares in USA Two. These twenty shares are all owned by ABP. There is no Board of Directors of either USA One or USA Two and there are only two general managers, both of whom are employees of ABP and one of whom is the Managing Director of ABP's Real Estate Division. The managing director of USA One and USA Two is the same person. The reason that ABP created two entities, USA One and USA Two, was for tax reasons. All of the executive personnel in ABP's "Boston office," were provided with stationary that stated: "ABP North American Real Estate Division," none of which reflected any of ABP's paper "USA" entities.

After ABP purchased its 65% interest in One Meridian Plaza, ABP's offices in The Netherlands were directly linked by computer to the office of its "assets manager" in Philadelphia so

that ABP could effectively operate and manage the Building from Heerlen. After the purchase of the majority interest in One Meridian Plaza, the top executives from ABP regularly attended and conducted meetings concerning the management and operation of One Meridian Plaza in both Philadelphia and Heerlen.

The district court and the Third Circuit both found that ABP financed the acquisition of the purchase of One Meridian Plaza by making an *unsecured* loan of over $96 million to its Pennsylvania partnership, USA One Associates, and that payments were made to ABP in United States dollars. App. 20a, 44a. Significantly, interest payments on the loan by ABP to its newly created paper "USA" entities were repaid directly to ABP "*out of the rental proceeds of One Meridian Plaza.*" Thus, ABP had a tremendous economic incentive to increase rental proceeds at One Meridian Plaza in order to keep its "loan" current, and therefore increase the value of the Building as anticipated by its fifteen year projection. Consequently, ABP immediately began to implement policies to attract tenants by allocating funds toward cosmetic and aesthetic improvements and away from the required life-safety systems. Furthermore, in short order these policies became even more accentuated as ABP and its top executives suspiciously began to realize that its American partners with the minority interest in the Building had a "serious conflict of interest" as minority owners and managers in One Meridian Plaza and as majority owners of a new *and empty* competing commercial high-rise office building only two blocks away.

Once it had a majority interest in One Meridian Plaza, ABP immediately insisted that all funds be spent on aesthetic and cosmetic improvements because it was concerned that its American partners were diverting tenants away from One Meridian Plaza to their new development, the new Mellon Bank Center. For example, ABP instructed its United States agent to watch ABP's American partners:

> . . . to make sure that Rubin is taking all appropriate actions to lease space in One Meridian Plaza and is not favoring their other buildings over this building. Rodin is to make sure the tenant gets to the front door, so then we have the ability to negotiate with the tenants. *ABP* will be in a position to be flexible in negotiating with tenants.

(Emphasis added). These were the tenants needed to generate the rental proceeds to make the interest payments directly to ABP on its unsecured loan.

ABP's mismanagement and negligence in operating One Meridian Plaza. The record before the district court, but not considered by the Third Circuit, details numerous intentional violations of the Building and Fire Codes as well as a cavalier and reckless disregard for life-safety. For example, in the fall of 1990, ABP chose to make aesthetic and cosmetic changes — such as extensively refurbishing the Building's elevators and lobby — at great cost in order to attract and retain tenants in order to (1) repay the interest on ABP's unsecured loan and (2) to compete with its own partners' other commercial high-rise projects. The projected cost of this commercial face-lift was $1.5 million for the lobby and $465,00 for the elevators, thus totaling approximately $2 million.

Previously, in 1988, the City of Philadelphia issued a Variance which required that all floors of One Meridian Plaza be fully retrofitted with sprinklers within five years. In October 1990, ABP estimated the cost of the sprinklers to be between $1.5 million and $2 million, the same amount suddenly and coincidentally budgeted by ABP to beautify the lobby and elevators.

For over a year, between at least September 1989 and December 1990, ABP and its United States agent, Rodin, carefully considered the economic costs and benefits of deliberately *not*

complying with the 1988 Variance which required them to retrofit One Meridian Plaza with sprinklers by 1993. On January 17, 1991, after considering the costs and benefits of *not* complying with the Variance requiring sprinklers, the owners sent the City of Philadelphia a letter stating that they would not comply with the Variance. *That same day,* the head of ABP's North American Real Estate Division transmitted the 1991 One Meridian Plaza Operating Budget from "ABP's Boston Office" to ABP's home office in Heerlen and specifically noted that the $1.5 million would be spent on lobby beautification.

Contrary to the Variance, ABP and its partners decided that they would sprinkler the floors as a tenant moved out and a new tenant moved in to pass the cost along to the new tenant as part of its tenant fit-out allowance. But on July 25, 1989, the minority American partners went to "ask Dutch if they are interested" in installing sprinklers when a major new tenant balked at having to pay the cost of such installation. In fact, ABP decided not to install those sprinklers even at the time of a major tenant turn-over, thus not even complying with its own reckless internal policy.

Subsequent to this long-debated decision to renovate the lobby and to not install sprinklers, a massive fire ripped through eight floors of commercial office space fueled by reams of commercial paper in the heart of the commercial district of the fifth largest commercial center in the United States. ABP deliberately gambled with the lives and livelihoods of the people who worked in and around One Meridian Plaza as well as with the lives of the firefighters because of its concern that its American partners were diverting tenants to another commercial project.

Between June 1989 and the night of the fire, the Building was physically inspected by ABP's United States agent on a monthly basis, which reports were regularly telecopied directly to ABP's top executives in The Netherlands. The fire started on the twenty-second floor of One Meridian Plaza and was sucked toward the

electrical vault which housed the Building's main electrical system by a draft created by what the owners repeatedly referred to in various written documents over the course of three years as "fire penetrations" in the fire walls of One Meridian Plaza.[3]

Unfortunately, these "fire penetrations" were never sealed because ABP and its partners implemented the same policy for sealing the fire penetrations as they did for retrofitting the Building with sprinklers, which was to wait until a tenant moved out and a new tenant moved in so that the cost could be passed along to the new tenant as part of its Tenant Allowance to refit its new space. The tenants of One Meridian Plaza, however, were long-term corporate tenants with leases well into the next century. Despite repeated physical inspection by ABP and its agents, years later, these fire penetrations were still not sealed.

When the flames reached the five feet by sixteen inch fire penetration in the 22nd floor's fire wall, the heat and flames caused the main electrical cables to arc, causing a total loss of electrical power to the entire Building. Tragically, the Emergency Generator was also out of operation for nine months before the fire. The head of ABP's Real Estate Division admitted that he instructed his United States agent to stop sending him these crucial Emergency Generator reports. If ABP and ABP's United States agent did not recklessly and willfully agree to stop reviewing those life-safety reports, they would have clearly known that the Emergency Generator was out of operation for the nine months preceding the fire. The combination of the existence of the fire penetrations, which caused the main power failure, and the inoperable Emergency Generator, proved to be fatal to fighting the fire and to

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3. No one reported the fire to the Fire Department because the owners of the Building had previously agreed with the private off-site fire alarm company not to report a fire alarm until it could be verified as an actual fire because of the numerous prior false alarms in the Building. This was another intentional code violation.

three firefighters because there were no elevators to carry equipment, no HVAC to ventilate the smoke and no lights to see or exit signs to lead them out of the darkness. As a result, three firefighters died and thousands of United States citizens suffered damages in excess of $100 million dollars.

The district court, in each of the three cases on appeal, ruled that ABP was amenable to suit under the commercial activity exception set forth in Section 1605(a)(2) as well as the "fraud or injustice" exception to the FSIA set forth in *Bancec*. The district court, in denying ABP's Motion to Dismiss Plaintiffs/Petitioners' Complaint, relied on a prior decision issued in one of the other two separate and unrelated cases. *See* App. 22a, 117a.

The three separate cases were consolidated on appeal to the Third Circuit by motion of Petitioners. App. 18a. The Third Circuit reversed the district court in all three instances, holding that the lower court erred in its interpretation of the FSIA commercial activity exception, and remanded Petitioners' case to the district court for proceedings consistent with the Third Circuit's opinion.

REASONS FOR GRANTING THE WRIT

I.

THE THIRD CIRCUIT'S DECISION IS CONTRARY TO THE PLAIN LANGUAGE OF THE THIRD CLAUSE OF THE COMMERCIAL ACTIVITY EXCEPTION OF THE FSIA AND IS IN CONFLICT WITH DECISIONS FROM OTHER CIRCUITS.

This Court may grant a petition for a writ of certiorari where there are "special and important reasons therefor." *See* Supreme Court Rule 10.1. Factors considered in granting certiorari include whether a circuit court rendered a decision in conflict with the decision of another United States circuit court on the same matter,

has decided an important question of federal law which has not been, but should be, settled by this Court or where a circuit court has decided a federal question in a way that conflicts with applicable decisions of this Court. *See* Supreme Court Rules 10.1(a) and 10.1(c).

In this case, the Third Circuit disregarded the first and second clauses of the commercial activity exception to the FSIA without discussion and then erroneously interpreted the third clause of the commercial activity exception of the FSIA in contravention of its plain and unambiguous language. The Third Circuit misconstrued the third clause of Section 1605(a)(2) in holding that Petitioners' claims must be "based upon" a foreign state's commercial activity, when the statute merely requires that Petitioners' claims be "based upon" and "act . . . in connection with a commercial activity." *See* Section 1605(a)(2). The Third Circuit's construction of the third clause of Section 1605(a)(2) is squarely in conflict with decisions from other circuits and must be reversed.

The starting point in every case involving statutory construction is the language of the statute itself. *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975)). This is because there is "no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (citing *United States v. American Trucking Association, Inc.*, 310 U.S. 534 (1940)).

In resolving disputes over the meaning of a statute, this Court has held that:

> The task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself. [Citations omitted.] In this case it

> is also where the inquiry should end, for where, as here, the statute's language is plain, "the sole function of the courts is to enforce it according to its terms."

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470 (1919)).

The third clause of Section 1605(a)(2) is clear and unambiguous in that it only requires the action to be based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). Indeed, the third clause of Section 1605(a)(2) does not require the action to be based upon a commercial act:

> By its terms, the commercial activity exception requires only that the act sued upon be performed *in connection with* a commercial activity; it does not further require that the act sued upon *itself* be commercial. While there are numerous occasions where the courts are well advised to look beyond the literal wording of the FSIA, [citation omitted], the Court does not regard this to be an appropriate instance in which to do so.

Gibbons v. Udaras na Gaelachta, 549 F. Supp. 1094, 1111, n. 7 (S.D.N.Y. 1982) (emphasis in original). Nevertheless, in spite of the unambiguous language of Section 1605(a)(2), the Third Circuit reversed the district court because Petitioners' claims were not purportedly "based upon" the commercial activity engaged in by ABP as found on the incomplete factual record of an unrelated and immature litigation. The Third Circuit was clearly in error, as Petitioners' claims are "based upon" ABP's actions in making decisions regarding the mismanagement and operation of One

Meridian Plaza, which were necessarily performed "in connection with" the commercial activity engaged in by ABP, even as found by the courts below on the limited factual record from another unrelated and immature action.

This Court has noted that an analysis of foreign sovereign immunity must begin "by identifying the particular conduct on which the . . . action is " 'based.' " *Saudi Arabia v. Nelson*, __ U.S. __, __, 113 S. Ct. 1471, 1477 (1993). The Third Circuit identified the conduct on which Petitioners' action is based as follows:

> The various plaintiffs allege several tort-based theories of recovery stemming . . . from the improper maintenance and operation of the building. The theory underlying all these claims is that One Meridian Plaza was managed in such a fashion as to ignore local, state, and national fire codes, which resulted in a fire causing numerous injuries to the various plaintiffs.

App. 44a.

The Third Circuit also ruled that ABP engaged in the following commercial activities outside the territory of the United States: (1) it provided an unsecured loan to a wholly owned Pennsylvania partnership for the purpose of financing the acquisition of a majority ownership interest in One Meridian Plaza; and (2) the terms of the loan were negotiated and executed in The Netherlands, with payments to be made directly to ABP by the Pennsylvania partnership in The Netherlands in United States dollars. App. 441. The Third Circuit thus held that "ABP did undertake commercial activity in The Netherlands by means of providing a loan to USA One Associates and collecting payments on that loan." App. 45a.

Petitioners therefore satisfied the requirements for stating a claim against ABP under the third clause of Section 1605(a)(2). Petitioners' claims are based upon ABP's actions in making decisions regarding the operation and mismanagement of One Meridian Plaza.[4] Further, the "acts" were necessarily performed "in connection with" ABP's commercial activity in The Netherlands, for ABP would not have been mismanaging One Meridian Plaza but for its purchase of a majority interest in the building through a wholly owned Pennsylvania partnership. ABP's actions in making decisions regarding the operation and management of One Meridian Plaza also caused a "direct effect" in the United States, as acknowledged by the Third Circuit: "The theory underlying all these claims is that One Meridian Plaza was managed in such a fashion as to ignore local, state, and national fire codes, which resulted in a fire *causing numerous injuries to the various plaintiffs.*" App. 44a (emphasis added).

The Third Circuit nevertheless proceeded to re-write the third clause of Section 1605(a)(2) by holding that Petitioners' cause of action had to be based upon the aforementioned commercial activity of ABP in The Netherlands:

> . . . [t]he district court erred in its interpretation of the FSIA commercial activity exception . . . because the claims alleged did not arise from

---

4. Because decisions regarding the operation and management of One Meridian Plaza were made by ABP in Philadelphia and in The Netherlands, jurisdiction over Petitioners' claims against ABP also clearly exists under either the first, second or third clause of Section 1605(a)(2). Indeed, the second clause of Section 1605(a)(2) provides that a foreign state is not immune from suit where the action is based "upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere . . ." 28 U.S.C. § 1605(a)(2). *See, e.g., Texas Trading v. Federal Republic of Nigeria*, 647 F.2d 300, 311 n. 30 (2d Cir. 1981) ("Given Congress's broad approach in the language of § 1605(a)(2), it is not at all improbable that a suit could be brought under more than one clause"), *cert. denied*, 454 U.S. 1148 (1982).

> the commercial activities undertaken by the Dutch parent corporations *as found by the court.*

46a (emphasis added). Once again, the district court found its facts based on an admittedly limited factual record from a separate, unrelated and immature action to which Petitioners are not a party.

The Third Circuit's decision is not only contrary to the plain language of the third clause of Section 1605(a)(2), it is also in conflict with decisions from other circuits that have applied this prong of the commercial activities exception. For example, in *Vermuelen v. Renault, U.S.A., Inc.*, 985 F.2d 1534 (11th Cir. 1993), the Eleventh Circuit held that jurisdiction was proper under the third clause of Section 1605(a)(2). The plaintiff in *Vermuelen* suffered severe personal injuries in a car accident in Georgia and sued the manufacturer of the automobile, a corporation wholly owned by the French Government. The Eleventh Circuit's analysis reflects the proper interpretation to be given to the third clause of Section 1605(a)(2):

> The acts upon which Vermuelen's claims against RNUR are based are the allegedly negligent design and manufacture of the 1982 LeCar passenger restraint system. Under the third clause of section 1605(a)(2), therefore, RNUR is not immune from suit in the United States-and thus federal jurisdiction exists-if the design and manufacture of the LeCar restraint system occurred outside the territory of the United States; was done in connection with a commercial activity outside the United States; and caused a direct effect in the United States.
>
> RNUR concedes that it designed and manufactured Vermuelen's LeCar in France.

> [Citation omitted.] Thus, the only issues are whether those acts were taken in connection with a commercial activity of RNUR outside, and whether they had a direct effect inside, the United States.

Vermuelen, supra, 985 F.2d at 1543-44.

The Third Circuit's decision is also in conflict with other Circuits. *See Antares Aircraft v. Federal Republic of Nigeria*, 999 F.2d 33, 35 (2d Cir. 1993) ("The following is not in dispute. The 'act outside the territory of the United States' was the allegedly wrongful detention of the plane in Nigeria. The detention of the aircraft and collection of fees were 'in connection with a commercial activity of a foreign state.' [Citation omitted.] The final element . . . poses the issue remaining on this remand, namely . . . did the detention of the aircraft cause 'a direct effect in the United States?'"), *cert. denied*, __ U.S. __, 114 S. Ct. 878 (1994); *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1384-85 (8th Cir. 1993) (". . . the third clause of the commercial activity exception . . . excludes from immunity protection *an act* outside the United States 'that causes a direct effect in the United States'") (emphasis added); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 710 (9th Cir. 1992) ("The Sidermans base their claims on Argentina's seizure and continuing operation of INOSA, both of which constitute acts that Argentina has performed outside United States territory. It is equally clear that they have been performed in connection with . . . commercial activities . . . The dispositive element in clause three for purposes of this case, therefore, is the requirement that the acts cause a direct effect in the United States"), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1812 (1993); *Texas Trading, supra*, 647 F.2d at 311 n. 30 (we have little doubt that *the acts* these actions are 'based upon' were 'in connection' with defendants' commercial activity") (emphasis added); *Gibbons, supra*, 549 F. Supp. at 1112 ("where the connected commercial activity was carried on abroad, subject

matter jurisdiction depends on a finding that the act sued upon was either performed in the United States or caused a direct effect in the United States").

Consequently, the effect of the Third Circuit's misinterpretation of the statute is to impose an additional requirement for pleading a claim against a foreign sovereign under the third clause of Section 1605(a)(2). Under the Third Circuit's analysis, a court does not have subject matter jurisdiction under the third clause of Section 1605(a)(2) unless the act outside the territory of the United States upon which the action is based is commercial in nature. The Third Circuit has thus effectively re-written the third clause of Section 1605(a)(2) to read that "a foreign state shall not be immune from the jurisdiction of courts of the United States or the States in any case . . . in which the action is based . . . upon a *commercial act* outside the territory of the United States *in connection with a commercial activity of the foreign state* elsewhere . . ." This is clearly not the result intended by Congress where the statute plainly refers to "*an act* outside the territory of the United States" and not to "a commercial act."

II.

THE INTERPRETATION AND APPLICATION OF THE THIRD CLAUSE OF THE COMMERCIAL ACTIVITY EXCEPTION OF THE FSIA HAS NEVER BEEN SETTLED BY THIS COURT.

The "commercial activity" exception of the FSIA is comprised of three clauses. Under this exception, a foreign state shall not be immune from suit where (1) "the action is based upon a commercial activity carried on in the United States by the foreign state"; (2) where the action is "based upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere"; or (3) where the action is "based upon an act outside the territory of the United States in connection with a

commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." *See* 28 U.S.C. § 1605(a)(2).

Petitioners argued that ABP was not immune from suit under all three clauses of the commercial activity exception. The district court found that it had jurisdiction over ABP under the third clause of the commercial activity exception because ABP engaged in commercial acts outside the United States that had a direct effect inside the United States. *See* App. 131-33a. Neither the district court nor the Third Circuit even discussed the first or second clauses of the commercial activity exception.

The Third Circuit, citing this Court's decision in *Saudi Arabia v. Nelson*, ___ U.S. ___, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993), rejected the district court's holding that it had subject matter jurisdiction over ABP under the third clause of the commercial activity exception because "the claims alleged in the lawsuit were not 'based upon' *ABP's commercial loan transaction* with its subsidiary USA One Associates." App. 46a (emphasis added).

The Third Circuit's holding is contrary to this Court's opinion in *Saudi Arabia v. Nelson* regarding the interpretation of the third clause of the commercial activity exception. Although this Court has not definitively ruled on the interpretation and application of the third clause of Section 1605(a)(2), the Third Circuit's holding ignores the distinction made by this Court that there is a difference between a suit "based upon" commercial activity and one "based upon" acts performed "in connection with" such activity. *See Saudi Arabia v. Nelson*, ___ U.S. at ___, 113 S. Ct. at 1477-78, 123 L. Ed. 2d at 59.

Nelson involved the exercise of a sovereign police power in Saudi Arabia and not commercial activity in or affecting the United States. In *Nelson*, the plaintiffs argued that Saudi Arabia was not immune from suit under the first clause of the FSIA. Accordingly,

this Court's review of the "commercial activity" exception of the FSIA was limited to the first clause of Section 1605(a)(2). However, this Court noted in dicta that the second and third clauses of the commercial activity exception are distinguishable from the first clause:

> Distinctions among descriptions juxtaposed against each other are naturally understood to be significant . . ., and Congress manifestly understood there to be a difference between a suit "based upon" commercial activity and one "based upon" acts performed "in connection with" such activity. The only reasonable reading of the former term calls for something more than a mere connection with, or relation to, commercial activity.

Saudi Arabia v. Nelson, ___ U.S. at ___, 113 S. Ct. at 1477-78, 123 L. Ed. 2d at 59 (footnote and citation omitted).

Although the Third Circuit recognized the distinction between the first clause and the second and third clauses of the commercial activity exception made by this Court in *Nelson*, it noted that this Court "did not describe the extent of a substantive connection required under the second and third clauses of the commercial activity exception in *Nelson* because the case raised an issue only under the first clause of the exception" App. 45a. With this issue open, the Third Circuit then misapplied the "nexus" requirement by holding that Petitioners' causes of action were not "substantively connected" to ABP's loan transaction and other commercial activity. App. 44a, 46a.[5]

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5. This is also contrary to the record in *this* action because ABP diverted operational funds away from required life-safety systems toward aesthetic improvements in order to attract tenants to generate rental proceeds to make the interest payments on its own unsecured loan, which capitalized the purchase of the Building.

In so holding, the Third Circuit improperly construed the substantive nexus requirement of the third clause of the commercial activity exception by requiring that "the act", taken "in connection with the commercial activity," also be the "commercial activity of the foreign state elsewhere."

The Third Circuit's construction is contrary to the plain meaning of the FSIA. Section 1605(a)(2) plainly states that a foreign state shall not be immune from suit where the action is "based upon an act outside the territory of the United States" taken "in connection with a commercial activity of the foreign state elsewhere" and that act causes a direct effect in the United States. Section 1605(a)(2) requires only that the act which forms the basis of the claims occur "in connection with a commercial activity." There is no requirement that the act on which the claims are based be itself the "commercial activity of the foreign state elsewhere" found to exist by the district court.

The Third Circuit has misapplied the nexus requirement of the third clause of the commercial activity exception in contravention of this Court's distinction, made in *Nelson,* between the first and third clauses of the commercial activity exception of the FSIA. This Court in the *Nelson* case addressed only the first clause of Section 1605(a)(2) of the FSIA and, accordingly, made no holding as to the application of the third clause of Section 1605(a)(2). *See Saudi Arabia v. Nelson,* ___ U.S. at ___, 113 S. Ct. at 1477, 123 L. Ed. 2d at 58.

This Court has never considered whether the "act" sued upon must also be the "commercial activity of the foreign state elsewhere." This issue has been left unresolved by this Court and must be resolved by granting certiorari in this matter.

III.

IT WOULD WORK A FRAUD OR INJUSTICE IN CONTRAVENTION OF CONGRESSIONAL INTENT IN ENACTING THE FSIA TO RECOGNIZE A SEPARATE CORPORATE STATUS OF ABP AND ITS USA ENTITIES.

This Court has recognized that an incorporated foreign entity is not to be regarded as legally separate from its foreign state owner in all circumstances. *First Nat. City Bank v. Banco Para El. Com.*, 462 U.S. 628-29 (1983). Indeed, equitable principles permit a court to disregard the separate identities of a sovereign and its instrumentalities in numerous situations: where the corporation is so extensively controlled by its owner that a relationship of principal and agent is created; where recognition of the separate corporate identity would work a fraud or injustice; and where the corporate form is utilized to defeat legislative policies. *Id.* at 629-30.

The district court correctly concluded that to recognize the separate status of ABP from its subsidiaries would defeat Congress' intent in enacting the FSIA:

> Since the FSIA was enacted to ensure that foreign sovereigns could obtain immunity from suit in the United States for a foreign state's 'public' rather than commercial activities, allowing ABP to claim a shield of immunity in this circumstance . . . would enable ABP to circumvent its obligations for violations of the United States laws, while nevertheless reaping the benefits of investing in United States property.

App. 134a.

The district court's conclusion concerning Congress' intent in enacting the FSIA is accurate and appropriate:

> The overriding congressional purpose behind the FSIA was to codify the principle of international law known as "restrictive" sovereign immunity . . . this principle "restricts" the situations in which foreign states may claim immunity from judicial action to those concerning public, or sovereign acts *(jure imperii)*. Immunity is not extended, under this doctrine, to suits based on commercial acts, or private acts *(jure gestionis)*.

Velidor v. L/P/G Benghazi, 653 F.2d 812, 817 (3d Cir.), *cert. dismissed*, 455 U.S. 929 (1981).

The Third Circuit did not express any opinion as to whether the district court was correct in concluding that it would work a fraud or injustice to adhere to the separate status of ABP and USA Holding. App. 43a. Instead, the circuit court held that piercing the veil from ABP to USA Holding would not provide a basis for jurisdiction over ABP because the district court did not have subject matter jurisdiction over USA Holding. App. 43a.

The Third Circuit, however, erred by only focusing on one of ABP's paper "USA" subsidiaries. Indeed, USA One BV and USA Two BV did not dispute subject matter jurisdiction because they acknowledged that the commercial activity exception applied to them. App. 19a. Moreover, USA One Associates is a Pennsylvania partnership that was created to purchase a majority ownership interest in One Meridian Plaza through a $96.3 million dollar unsecured loan made directly from ABP to this Pennsylvania partnership. App. 20a, 44a. In support of ABP' Motion to Dismiss, ABP submitted sworn testimony by affidavit that the interest on this unsecured "loan" was paid directly to ABP by the

Pennsylvania partnership *out of the rental proceeds of One Meridian Plaza.* Clearly, jurisdiction over ABP and these paper "USA" subsidiaries exists.

It was therefore manifest error for the Third Circuit not to consider ABP's relationship with these subsidiaries and whether their separate status should be disregarded. Given Congress' intent in enacting the FSIA, it would work fraud or injustice to adhere to the separate status of ABP and its paper subsidiaries who admittedly engaged in extensive commercial activity in the United States.

IV.

THE THIRD CIRCUIT FAILED TO CONSIDER EVIDENCE OF RECORD DETAILING ABP'S COMMERCIAL ACTIVITY IN THE UNITED STATES.

The Third Circuit was presented with voluminous evidence of ABP's commercial actions in the United States, but ignored this evidence when it reversed the order of the district court. The Third Circuit did not consider this evidence on the grounds that "it is a matter for the district court on remand to decide that evidence it should consider with respect to the motions to dismiss." App. 32a. However, ABP has interpreted and asserted that the Third Circuit's directions to the district court foreclose the possibility of Petitioners' raising the commercial activity exception on remand. App. 46a. To the extent the Third Circuit's opinion can be interpreted as doing so, then it committed grave error by not considering the evidence of ABP's substantial commercial activities in the United States.

It is well-settled that, where the defendant challenges plaintiff's assertion of federal jurisdiction under Rule 12(b)(1), the court must give the plaintiff an opportunity to present facts in support of its jurisdictional contentions. *Colonial Pipeline Co. v.*

Collins, 921 F.2d 1237, 1243 (11th Cir. 1991) ("a plaintiff must have ample opportunity to present evidence bearing on the existence of jurisdiction"); *Berardi v. Swanson Memorial Lodge No. 48*, 920 F.2d 198, 200 (3d Cir. 1990) ("'the record must establish that after jurisdiction was challenged the plaintiff had an opportunity to present facts by affidavit or by deposition, or in an evidentiary hearing, in support of his jurisdictional contention'") (quoting *Local 336, American Federation of Musicians, AFL-CIO v. Bonatz*, 475 F.2d 433, 437 (3d Cir. 1973)). This rule of course applies to challenges made under the FSIA to subject matter jurisdiction. *See, e.g., Foremost-McKesson v. Islamic Republic of Iran*, 905 F.2d 438, 449 (D.C. Cir. 1990); *Gould, Inc. v. Pechiney Ugine Kuhlman*, 853 F.2d 445, 451 (6th Cir. 1988). Indeed, it has been stressed that a party must be given "'an ample opportunity to secure and present evidence relevant to the existence of jurisdiction.'" *Rogers v. Stratton Indus.*, 798 F.2d 913, 915 (6th Cir. 1986) (quoting *Gordon v. National Youth Work Alliance*, 675 F.2d 356, 363 (D.C. Cir. 1982) (Robinson, C.J. concurring)).

This rule is consonant with the FSIA's legislative history, which indicates that it is *evidence* that must be considered in deciding whether a foreign state is immune from suit:

> The burden will remain on the foreign state to *produce evidence in support of its claim of immunity.* Thus, *evidence must be produced* to establish that a foreign state or one of its subdivisions, agencies or instrumentalities is the defendant in the suit and that the plaintiff's claim relates to a public act of the foreign state - that is, an act not within the exceptions in sections 1605 - 1607. Once the foreign state has produced such prima facie evidence of immunity, the burden of going forward would shift to the plaintiff *to produce evidence* establishing that the foreign state is not entitled

> to immunity. The ultimate burden of proving immunity would rest with the foreign state.

H.R. Rep. No. 1487, 94 Cong., 2d Sess. 1, 17, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 661 (emphasis added).

Petitioners produced ample evidence to the district court and the circuit court establishing subject matter jurisdiction over ABP under the commercial activity exception to the FSIA. However, the district court made its factual finding in another unrelated and immature case and then simply incorporated them by reference into this action. App. 117a. The Third Circuit did not consider this evidence because it stated that it would be within the discretion of the district court to do so on remand. App. 46a. As asserted by ABP, however, the Third Circuit provided ambiguous directions for the district court and the parties on remand, as the Third Circuit's opinion appears to contradict itself and indicate that Petitioners are precluded from raising the commercial activity exception on remand:

> We will remand these cases to the district court for further proceedings consistent with this opinion. To the extent that the plaintiffs raised the "non-commercial tort" exception in response to the motions to dismiss and for summary judgment, they may again assert that exception on remand.

46a.

If the Third Circuit's opinion is interpreted as preventing Petitioners from advancing the commercial activity exception on remand, the Petitioners have been deprived of their Constitutional right to Due Process and the opportunity to present evidence relevant to the existence of jurisdiction. Indeed, Petitioners have amassed such evidence and it should not have been ignored by the

Third Circuit to establish jurisdiction over ABP because of judicial procedural error by the district court.

CONCLUSION

For the forgoing reasons, the petition for a writ of certiorari must be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED DECEMBER 28, 1993

Filed December 28, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-1157
Nos. 93-1474/1475/1476/1477/1478/1479/1480/1481
No. 93-1590

FEDERAL INSURANCE COMPANY, SUBROGEE OF MUTUAL GROUP, LTD., N.R.G. AMERICA HOLDING COMPANY d/b/a PHILADELPHIA REINSURANCE COMPANY, N.R.G. AMERICAN HOLDING COMPANY d/b/a N.R.G. AMERICAN LIFE, WERTHEIM SCHRODER & CO., INC., PAINE WEBBER GROUP, INC., GOLDMAN SACHS & COMPANY, SCUDDER, STEVENS & CLARK, INC., PITCAIRN PRIVATE BANK, THE PALMIERI COMPANY, 1838 INVESTMENT ADVISORS, EASTERN TELELOGIC, MARK GOLDMAN, AS EXECUTOR OF THE ESTATE OF HERBERT GOLDMAN, JOSEPH FILLMORE, PAUL MARINO, WILLIAM WALL, EDWARD F. MANNINO, PATRICIA J. MYERS, LEWIS COHEN, JAY ALCHIN, MARY KENNEY, RICHARD ATCAVAGE; VIGILANT INSURANCE COMPANY, SUBROGEE OF EDWARD F. MANNINO & ASSOCIATES, P.C., BERNARD HEINZEN, PHILIP LEICHT, GEORGE HUNDT, JOSEPH L. PYLE, JULIAN A. BRODSKY, JOHN DAVISON, JR., PAUL M. YEAKEL; SUN INSURANCE OFFICE, LTD., SUBROGEE OF GEORGE M. ROSS, TIMOTHY SENNATT, ROBERT ALLEN, THADDEUS R. SHELLY, III, CLARENCE A. MCGOWAN, JR., FIELDING LAMASON, GLENN PARTRIDGE, WILLIAM THORKELSON, III, WILLIAM MCCOY, GEORGE HAWKE, KATHLEEN MACGREGOR, BRIAN GIBBONS, MICHAEL SATZBURG;

Appendix A

THE CONTINENTAL CORPORATION, SUBROGEE OF BAZELON & LESS, GREGORY ALEXANDER, ESQUIRE, ROBERT MCLEAN, SHARON MCGEEHAN AND DENNIS DEAN; AETNA LIFE AND CASUALTY INSURANCE COMPANY, SUBROGEE OF PRUDENTIAL INSURANCE COMPANY; PENNSYLVANIA MANUFACTURERS' ASSOCIATION, SUBROGEE OF M. KOWALCHIK AND ASSOCIATES; WEST AMERICAN INSURANCE COMPANY, SUBROGEE OF ELLIOTT, BRAY & RILEY, P.C.; ROYAL INSURANCE COMPANY, SUBROGEE OF MERIDIAN BANCORP, INC., PEGALIS & WACHSMAN, P.C., DONALD GOLDBERG, ESQUIRE, THE ROYAL BANK OF PENNSYLVANIA; USF&G CORPORATION, SUBROGEE OF JOHN GERARD DEVLIN, ESQUIRE; AMERICAN HOME ASSURANCE COMPANY, SUBROGEE OF BARNES & NOBLE BOOKSTORES, INC. d/b/a B. DALTON BOOKSTORE, BARNES & NOBLE BOOKSTORES, INC. d/b/a BARNES & NOBLE BOOK STORE; NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PENNSYLVANIA, SUBROGEE OF PRUDENTIAL INSURANCE COMPANY; ALLIANZ INTERNATIONAL INSURANCE COMPANY, LTD., SUBROGEE OF GOLDMAN SACHS & COMPANY; UNDERWRITERS AT LLOYD'S OF LONDON, SUBROGEE OF PRUDENTIAL INSURANCE COMPANY; ONE WORLD TRADE CENTER; SUN INSURANCE COMPANY, SUBROGEE OF U.S. LIFE CORPORATION; MARINE INDEMNITY INSURANCE COMPANY, SUBROGEE OF U.S. LIFE CORPORATION

v.

RICHARD I. RUBIN & CO., INC.; E/R ASSOCIATES; EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES; USA ONE ASSOCIATES; USA ONE B.V.; USA TWO B.V.; RODIN INVESTMENT ADMINISTRATION COMPANY; ALGEMEEN BURGERLIJK PENSIOENFONDS; USA HOLDINGS B.V.; EQUITABLE REAL ESTATE INVESTMENT MANAGEMENT, INC.; JONES LANGE WOOTTON USA; PAN AMERICAN OFFICE INVESTMENTS, INC.; BALIS & CO., INC.; MARSH & MCLENNAN

Appendix A

COMPANIES, INC.; NASON AND CULLEN, INC.; AMERICAN BUILDING MAINTENANCE COMPANY OF NEW YORK; PENN SPRINKLER COMPANY, INC.; DELMONT FIRE PROTECTION SERVICE, INC.; NATIONAL GUARDIAN SECURITY SERVICES CORPORATION; M&M EQUIPMENT COMPANY; JOSEPH F.X. GRIFFIN; GIACOMINI, S.P.A.; SHEWARD HENDERSON ASSOCIATES; BEER ASSOCIATES; BUTEN, M. & SONS, INC., T/A "BUTEN THE PAINT AND PAPER PEOPLE"

v.

HALPRIN SUPPLY COMPANY, INC.; SIERRA FIRE EQUIPMENT CO.; UNDERWRITERS LABORATORIES, INC.; PREMIER INDUSTRIAL CORPORATION; TASK FORCE TIPS, INC.; MARIS EQUIPMENT COMPANY; THE ENERGY CONSORTIUM, INC.; HONEYWELL, INC.; PYROTROL SYSTEMS, INC., DIVISION OF POTTER ELECTRIC SIGNAL COMPANY; WEBSTER AUTOMATION SYSTEMS, INC.; JOHN ASHE ASSOCIATES, INC.; H.B. FRAZER AND CO., INC.; MMR/FOLEY DIVISION OF MATTHEWS-MCCRACKEN-RUTLAND CORP.,

Third-Party Defendants

USA Holding BV and Algemeen Burgerlijk Pensioenfonds,

Appellants in No. 93-1157

IN RE: ONE MERIDIAN PLAZA FIRE LITIGATION

JOHN M. CORCORAN; and C.W.D. ENTERPRISES LTD., dba CHRIS' CAFE AND BAR; EJAY TRAVEL, INC., PLAINTIFFS FOR THEMSELVES AND ALL OTHERS SIMILARLY SITUATED

v.

RICHARD I. RUBIN & CO., INC.; E/R ASSOCIATES, t/a ONE MERIDIAN PLAZA; EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES; USA ONE ASSOCIATES; USA ONE B.V.; USA TWO B.V.; PAN

Appendix A

AMERICAN OFFICE INVESTMENTS, INC.; RODIN INVESTMENT ADMINISTRATION COMPANY; ALGEMEEN BURGERLIJK PENSIOENFONDS; EQUITABLE REAL ESTATE INVESTMENT MANAGEMENT, INC.; AETNA CASUALTY & SURETY COMPANY; AETNA LIFE INSURANCE COMPANY; JONES LANG WOOTTON USA; BALIS & CO.; PENN SPRINKLER COMPANY, INC.; DELMONT FIRE PROTECTION SERVICE, INC.; AMERICAN BUILDING MAINTENANCE COMPANY; NATIONAL GUARDIAN SECURITY SERVICES, CORP.; F. X. GRIFFIN,

Third-Party Plaintiffs

v.

HALPRIN SUPPLY COMPANY, INC.; SIERRA FIRE EQUIPMENT CO., RUBINETTERIE A GIACOMINI SPA; UNDERWRITERS LABORATORIES, INC.; PREMIER INDUSTRIAL CORPORATION, t/a AKRON BRASS COMPANY; TASK FORCE TIPS, INC.; MARIS EQUIPMENT COMPANY; THE ENERGY CONSORTIUM, INC.; HONEYWELL, INC.; PYROTROL SYSTEMS INC., DIVISION OF POTTER ELECTRIC SIGNAL COMPANY; WEBSTER AUTOMATION SYSTEMS, INC.; JOHN ASHE ASSOCIATES, INC.; H.B. FRAZER AND CO., INC.; NASON & CULLEN, INC.; SHEWARD HENDERSON; MMR/FOLEY DIVISION OF MATTHEWS-MCCRACKEN-RUTLAND CORP.; MORRIS-ROSPOND ASSOCIATES, INC., a/k/a MORRIS ROSPOND GROUP and/or THE ENERGY CONSORTIUM, INC.; M & M EQUIPMENT COMPANY; TABOR ACOUSTICAL, INC.; ORELAND SHEETMETAL, INC.,

Third-Party Defendants

Algemeen Burgerlijk Pensioenfonds,

Appellant in No. 93-1474

IN RE: ONE MERIDIAN PLAZA FIRE LITIGATION

ELLIOTT & BRAY, P.C.; NANCY DEMBOWSKI; VIRGINIA L. GRANDY; T. SEAN CRUMLISH; CONSTITUTION

Appendix A

BANCORP., N.A., PLAINTIFFS, FOR THEMSELVES AND ALL OTHERS SIMILARLY SITUATED

v.

RICHARD I. RUBIN & CO., INC.; E/R ASSOCIATES, t/a ONE MERIDIAN PLAZA; THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES; USA ONE ASSOCIATES; USA ONE B.V.; USA TWO B.V.; PAN AMERICAN OFFICE INVESTMENTS, INC.; RODIN INVESTMENT ADMINISTRATION COMPANY; ALGEMEEN BURGERLIJK PENSIOENFONDS; EQUITABLE REAL ESTATE INVESTMENT MANAGEMENT, INC.; AETNA CASUALTY & SURETY COMPANY; AETNA LIFE INSURANCE COMPANY; JONES LANGE WOOTTON USA; BALIS & CO.; PENN SPRINKLER COMPANY, INC.; ELMONT FIRE PROTECTION SERVICE, INC.; JOHN DOES #1 THROUGH #77,
(Defendants whose identities are currently unknown to Plaintiffs)

Algemeen Burgerlijk Pensioenfonds,

Appellant in No. 93-1475

IN RE: ONE MERIDIAN PLAZA FIRE LITIGATION

LOUIS J. BOUNDONNA; ROBERT ALLEN, on behalf of themselves and all others similarly situated

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES; E/R ASSOCIATES, T/A ONE MERIDIAN PLAZA; ALGEMEEN BURGERLIJK PENSIOENFONDS; PENN SPRINKLER COMPANY, INC.; RICHARD I. RUBIN & CO., INC.

Algemeen Burgerlijk Pensioenfonds,

Appellant in No. 93-1476

Appendix A

IN RE: ONE MERIDIAN PLAZA FIRE LITIGATION

LEGXPRESS, INC.; PENNSYLVANIA SQUARE CORP.

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES; E/R ASSOCIATES, T/A ONE MERIDIAN PLAZA; ALGEMEEN BURGERLIJK PENSIOENFONDS; RICHARD I. RUBIN & CO., INC.

Algemeen Burgerlijk Pensioenfonds,

Appellant in No. 93-1477

IN RE: ONE MERIDIAN PLAZA FIRE LITIGATION

REGENT INC. OF 15TH STREET d/b/a Giorgio Brutini, on behalf of itself and all others similarly situated *

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES; E/R ASSOCIATES, t/a ONE MERIDIAN PLAZA; ALGEMEEN BURGERLIJK PENSIOENFONDS; PENN SPRINKLER COMPANY, INC.; RICHARD I. RUBIN & CO., INC.

Algemeen Burgerlijk Pensioenfonds,

Appellant in No. 93-1478

* (Amended as per the Clerk's Order dated 6/17/93)

IN RE: MERIDIAN PLAZA FIRE LITIGATION

ANTHONY VINCIGUERRA, t/a 2 MELLON BANK CENTER BARBER SERVICES AND STYLING; SUNSHINE PERSONNEL, INC.; ROYAL BANK OF PENNSYLVANIA, for itself and for all others similarly situated

v.

Appendix A

RICHARD I. RUBIN & CO., INC.; E/R ASSOCIATES, t/a ONE MERIDIAN PLAZA; THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES; USA ONE ASSOCIATES; USA ONE B.V.; USA TWO B.V.; PAN AMERICAN OFFICE INVESTMENTS, INC.; RODIN INVESTMENT ADMINISTRATION COMPANY; ALGEMEEN BURGERLIJK PENSIOENFONDS; EQUITABLE REAL ESTATE INVESTMENT MANAGEMENT, INC.; AETNA CASUALTY & SURETY COMPANY; AETNA LIFE INSURANCE COMPANY; JONES LANGE WOOTTON USA; BALIS & CO.; PENN SPRINKLER COMPANY, INC.; DELMONT FIRE PROTECTION SERVICE, INC.; JOHN DOES #1 THROUGH #77

Algemeen Burgerlijk Pensioenfonds,

Appellant in No. 93-1479

IN RE: ONE MERIDIAN PLAZA FIRE LITIGATION

ROBERT J. ATLEE; TRIUMPHE FINANCIAL SERVICES, for themselves and all others similarly situated

v.

RICHARD I. RUBIN & CO., INC.; E/R ASSOCIATES, t/a ONE MERIDIAN PLAZA; THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES; USA ONE ASSOCIATES; USA ONE B.V.; USA TWO B.V.; PAN AMERICAN OFFICE INVESTMENTS, INC.; RODIN INVESTMENT ADMINISTRATION COMPANY; ALGEMEEN BURGERLIJK PENSIOENFONDS; EQUITABLE REAL ESTATE INVESTMENT MANAGEMENT, INC.; AETNA CASUALTY & SURETY COMPANY; AETNA LIFE INSURANCE COMPANY; JONES LANGE WOOTTON USA; BALIS & CO.; PENN SPRINKLER COMPANY; DELMONT FIRE PROTECTION SERVICE, INC.; JOHN DOES #1 THROUGH #77

Algemeen Burgerlijk Pensioenfonds,

Appellant in No. 93-1480

Appendix A

IN RE: ONE MERIDIAN PLAZA FIRE LITIGATION

JEFFREY BERMAN

v.

E/R ASSOCIATES, t/a ONE MERIDIAN PLAZA; RICHARD I. RUBIN & CO., INC.; EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES; RODIN ENTERPRISES; PAN AMERICAN OFFICE INVESTMENTS, INC.; RODIN INVESTMENT ADMINISTRATION COMPANY; ALGEMEEN BURGERLIJK PENSIOENFONDS; EQUITABLE REAL ESTATE INVESTMENT MANAGEMENT, INC.; AETNA CASUALTY & SURETY COMPANY; AETNA LIFE INSURANCE COMPANY; JONES LANGE WOOTTON USA; BALIS & CO.; PENN SPRINKLER COMPANY, INC.; DELMONT FIRE PROTECTION SERVICE, INC.

Algemeen Burgerlijk Pensioenfonds,

Appellant in No. 93-1481

MARY Y. HOLCOMBE, in her own right and as Administratrix of the Estate of DAVID P. HOLCOMBE, Deceased

v.

RICHARD I. RUBIN & CO., INC.; E/R ASSOCIATES, t/a ONE MERIDIAN PLAZA; EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES; ALGEMEEN BURGERLIJK PENSIOENFONDS; PENN SPRINKLER COMPANY, INC.; DELMONT FIRE PROTECTION SERVICE, INC.; BALIS AND CO., INC.; USA ONE ASSOCIATES; USA ONE B.V.; USA TWO B.V.; RODIN INVESTMENT ADMINISTRATION COMPANY; EQUITABLE REAL ESTATE INVESTMENT MANAGEMENT; JONES LANGE WOOTTON USA; PAN AMERICAN OFFICE INVESTMENTS, INC.; AMERICAN BUILDING MAINTENANCE COMPANY; NATIONAL GUARDIAN SECURITY SYSTEMS; JOSEPH F.X. GRIFFIN; M & M EQUIPMENT COMPANY;

Appendix A

v.

HALPRIN SUPPLY COMPANY, INC.; SIERRA FIRE EQUIPMENT CO.; RUBINETTERIE A GIACOMINI SPA; UNDERWRITERS LABORATORIES, INC.; PREMIER INDUSTRIAL CORPORATION, t/a AKRON BRASS COMPANY; TASK FORCE TIPS, INC.; MARIS EQUIPMENT COMPANY, DIVISION OF JWP, INC.; THE ENERGY CONSORTIUM, INC.; HONEYWELL, INC.; PYROTROL SYSTEMS, INC., DIVISION OF POTTER ELECTRIC SIGNAL COMPANY; WEBSTER AUTOMATION SYSTEMS, INC.; JOHN ASHE ASSOCIATES, INC.; H.B. FRAZER AND CO., INC.; NASON & CULLEN, INC.; SHEWARD-HENDERSON; MMR/FOLEY, DIVISION OF MATTHEWS-MCCRACKEN-RUTLAND CORP.; MORRIS-ROSPOND ASSOCIATES, a/k/a MORRIS ROSPOND GROUP and/or THE ENERGY CONSORTIUM, INC.; TABOR ACOUSTICAL, INC.; ORELAND SHEETMETAL, INC.,

Third-Party Defendants

Algemeen Burgerlijk Pensioenfonds,

Appellant in No. 93-1590

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Nos. 92-04177, 91-02171, 91-02172, 91-02226, 91-02227, 91-02374, 91-02545, 91-02546, 91-02547, 91-06122)

Argued: November 12, 1993

BEFORE: GREENBERG, COWEN and SEITZ, *Circuit Judges*

(Filed December 28, 1993)

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Appendix A

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Appendix A

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Appendix A

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Allianz International Insurance Company, Subrogee of Goldman Sachs & Company

Sun Insurance Co., Subrogee of U.S. Life Corporation

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Appendix A

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Robert Allen, on behalf of himself and all others similarly situated

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Appendix A

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Honeywell, Inc.

Appendix A

OPINION OF THE COURT

Cowen, *Circuit Judge.*

These cases arise from the February 23, 1991 fire that engulfed One Meridian Plaza, an office building in Philadelphia, Pennsylvania. The catastrophic fire resulted in substantial destruction of the thirty-eight story office tower, the deaths of three firefighters who responded to the blaze, and lawsuits alleging losses of nearly $600 million. While procedurally distinct, these appeals all raise the same issue: whether the district court properly concluded that two Dutch parent corporations,[1] whose subsidiary owns sixty-five percent of the partnership that owns the office building, are proper defendants under the commercial activity exception to the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602-1611.

The district court ruled that the Dutch parent corporations are amenable to suit under the FSIA commercial activity exception, *id.* § 1605(a)(2), and because granting the corporations' motion to dismiss would "work fraud or injustice" on the legislative policies of the FSIA. Although raised in the motions to dismiss, the district court declined to address whether the "non-commercial tort" exception, *id.* § 1605(a)(5), would make the corporations subject to suit in federal district court. We will reverse the district court in all three cases because it erred in its interpretation of the FSIA commercial activity exception.[2]

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1. Two defendants are at issue in this case: Algemeen Burgerlijk Pensioenfonds ("ABP") and USA Holding B.V. ("USA Holding"). In this opinion, these two corporations will be referred to jointly as the "Dutch parent corporations." USA Holding has appealed the denial of a motion to dismiss in Docket No. 93-1157 only. ABP has appealed the denial of its motion to dismiss or its motion for summary judgment in all cases consolidated for purposes of this appeal.

2. In this opinion, we address only whether the district court was correct as a matter of law in its decision to exercise jurisdiction over ABP and USA Holding under the FSIA commercial activity exception. We decline the parties' invitation to address whether the district court could exercise jurisdiction under the FSIA non-commercial tort exception because the district court failed to rule on the applicability of this exception in the first instance.

Appendix A

I. FACTS AND PROCEDURAL HISTORY

A.

Three separate but related cases have been consolidated in this appeal. In the first case, Docket No. 93-1157, the plaintiffs consist of fourteen insurance companies who have brought a subrogation action against the owners and managers of One Meridian Plaza. With respect to this case, the Federal Insurance plaintiffs allege several theories of liability, including negligence and breach of contract. At issue in this case is whether the district court properly denied the motion to dismiss filed by Algemeen Burgerlijk Pensioenfonds ("ABP") and USA Holding B.V. ("USA Holding"), two of the many owner/manager defendants. For purposes of this opinion, this case will be referred to as the "Federal Insurance litigation."

The second case consists of eight docketed appeals[3] in which the "nontenants"[4] have sued the owner/manager defendants on theories of negligence *per se*, negligence, strict liability, trespass, private nuisance, and public nuisance. At issue in this case is whether the district court properly denied the motion to dismiss filed by ABP. For purposes of this opinion, this case will be referred to as the "class action litigation."

In the third case, Docket No. 93-1590, the estate of a firefighter ("Holcombe plaintiff") has sued the

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3. This case encompasses our Docket Nos. 93-1474, 93-1475, 93-1476, 93-1477, 93-1478, 93-1479, 93-1480 and 93-1481.

4. The nontenants consist of various parties who were not tenants of One Meridian Plaza at the time of the fire but who allege they suffered uninsured losses as a result of the fire. *In re One Meridian Plaza Fire Litig.*, 820 F. Supp. 1460, 1464 (E.D. Pa. 1993). These cases were originally filed in a Pennsylvania state court, but were removed to the United States District Court for the Eastern District of Pennsylvania by defendant ABP. The district court consolidated all of these complaints into a class action complaint and considered and ruled on motions to dismiss and motions for a more definite statement filed by each defendant. *Id.* By order dated July 15, 1993, the district court denied the class plaintiffs' motion for class certification. *In re One Meridian Plaza Fire Litig.*, 26 Fed. R. Serv. 3d (Callaghan) 974, 975 (E.D. Pa. 1993).

owner/manager defendants for economic damages resulting from pain and suffering and wrongful death.[5] At issue in this case is whether the district court properly denied ABP's motion for summary judgment. For purposes of this opinion, this case will be referred to as the "Holcombe case."

The owner/manager defendants consist of several U.S. and Dutch entities. These cases concern only the top two rungs in a five-tier Dutch corporate arrangement that was formed to purchase and own a sixty-five percent share in One Meridian Plaza.[6] Defendant ABP is a corporation organized and existing pursuant to the laws of the Netherlands and serves as the Netherlands' general civil employees pension fund. This corporation was created by an act of the Dutch Parliament and maintains its principal place of business in the Netherlands.

ABP is the parent corporation of defendant USA Holding, which is also a Dutch corporation with its principal place of business in the Netherlands. USA Holding, in turn, is the parent corporation of two wholly-owned subsidiary defendants, USA One B.V. and USA Two B.V.,[7] which were incorporated "to invest in, purchase, sell, manage, and rent real estate in the United States." *Federal Ins. Co. v. Richard I. Rubin & Co.*, No. 92-4177, 1993 WL 21327, at *1 (E.D. Pa. Jan. 26, 1993). While USA One B.V. and USA Two B.V. are Dutch corporations, they are general partners in defendant USA One Associates, a Pennsylvania partnership formed to acquire an ownership interest in E/R Associates, a joint venture that owns the One Meridian Plaza building.

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5. This case was also originally filed in a Pennsylvania state court and removed to the United States District Court for the Eastern District of Pennsylvania by defendant ABP.

6. As our disposition of these cases turns on the district court's interpretation of the FSIA in the Federal Insurance litigation case, we will summarize only the factual findings made by the district court in that opinion. *See Federal Ins. Co. v. Richard I. Rubin & Co.*, No. 92-4177, 1993 WL 21327, at *1 (E.D. Pa. Jan. 26, 1993).

7. USA One B.V. and USA Two B.V. do not dispute subject matter and personal jurisdiction in these cases because they acknowledge that the commercial activity exception contained in the FSIA applies to them.

At its formation, USA One Associates was capitalized with approximately $29,700,000 from USA One B.V. and $300,000 from USA Two B.V.

Defendant ABP financed USA One Associate's acquisition of a sixty-five percent interest in E/R Associates through an unsecured loan of $96,300,000 at a market interest rate of ten percent. The loan was executed pursuant to the laws of the Netherlands, and payments were made to ABP in the Netherlands in U.S. dollars. Once USA One Associates acquired its interest in E/R Associates, it retained defendant Rodin Investment Administration Company ("Rodin") to oversee the daily operations of this investment, including making management and operations decisions concerning One Meridian Plaza. Defendant U.S. Alpha, Inc. later replaced Rodin in its capacity to make decisions regarding the management of the building.

B.

In the Federal Insurance litigation case, ABP and USA Holding (jointly the "Dutch parent corporations") moved to dismiss all claims brought against them because they are agencies or instrumentalities of a foreign state, and are immune from suit in the United States because none of the FSIA exceptions waiving immunity is applicable. The motion was made pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(2) for lack of subject matter and personal jurisdiction. The district court denied this motion in an unpublished opinion, finding that the Dutch parent corporations engaged in commercial activity within the meaning of the commercial activity exception to the FSIA. *Federal Ins. Co.*, No. 92-4177, 1993 WL 21327, at *5-6. With respect to USA Holding, the district court held that this corporation engaged in commercial activity in the United States, within the meaning of the first clause of this exception, by virtue of its ownership of USA One B.V. and USA Two B.V. *Id.* at *5.

Turning to ABP, the district court found sufficient commercial activity to relinquish immunity based on two alternative theories. First, the court held that ABP committed acts outside the U.S. "'in connection with a

commercial activity elsewhere that cause[d] a direct effect in the United States.'" *Id.* (quoting 28 U.S.C. § 1605(a)(2)). Specifically, the court found that ABP's financing of the One Meridian Plaza acquisition through an unsecured loan was sufficient to allow the court to exercise subject matter jurisdiction over ABP pursuant to the third clause of the FSIA commercial activity exception. *Id.* at *5-6.

Second, the district court concluded that ABP was subject to jurisdiction by "piercing the corporate veil" so as to consider ABP and USA Holding one entity. *Id.* at *6. Under this theory, the court found that there was not sufficient evidence to conclude that there was a principal-agent relationship between the two companies, *id.*, but that the corporate veil should be pierced anyway to "avoid fraud and injustice in contravention of [FSIA] legislative policies," *id.* at *7. The district court held that dismissing ABP would be unjust because ABP would be using the FSIA to avoid liability as a defendant, while simultaneously reaping the benefits of U.S. law through its investment in subsidiaries owning real estate in the United States. *Id.*

Thus, the district court denied ABP and USA Holding's motion to dismiss in the Federal Insurance litigation case.[8] In the class action litigation, ABP moved the court to

8. Noting that the Dutch parent corporations premised their motion to dismiss for lack of personal jurisdiction entirely on their argument that none of the FSIA immunity exceptions applied, which is an attack on the subject matter jurisdiction of the court, the district court denied the motion to dismiss upon ruling that it had subject matter jurisdiction over ABP and USA Holding pursuant to the FSIA commercial activity exception. *Federal Ins. Co.*, No. 92-4177, 1993 WL 21327, at *7. In this appeal, the Dutch parent corporations renew their argument that the district court lacked personal jurisdiction over them, but again provide no independent basis for this theory. *Cf. Velidor v. L/P/G Benghazi*, 653 F.2d 812, 816 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929, 102 S. Ct. 1297 (1982) (defendants argued that the court lacked *in personam* jurisdiction based on the FSIA admiralty provision and improper service of process). We agree with the district court that in this case the motion to dismiss for lack of personal jurisdiction is subsumed by the Dutch parent corporations' motion to dismiss for lack of subject matter jurisdiction. Therefore, we will not discuss personal jurisdiction separately from subject matter jurisdiction.

dismiss all counts against it for the same reason—because the district court lacked personal and subject matter jurisdiction over it. The court summarily rejected this motion by stating that the "issue has been resolved in an order dated January 26, 1993, denying ABP's motion to dismiss on the same grounds in a related case before this court." *In re One Meridian Plaza Fire Litig.*, 820 F. Supp. 1460, 1491 (E.D. Pa. 1993) (citing *Federal Ins. Co.*, No. 92-4177, 1993 WL 21327). In the Holcombe case, ABP filed a motion for summary judgment on the ground that the district court had no subject matter jurisdiction because ABP's activities did not fall into any of the FSIA exceptions. The district court denied this motion in an order dated May 24, 1993 without opinion or reference to the earlier related dispositions.

II. JURISDICTION

A. *Jurisdiction of the District Court*

These cases were brought by various plaintiffs against the owner/manager defendants, which include the Dutch parent corporations. The parties do not dispute that ABP and USA Holding are agencies or instrumentalities of the Dutch government, and the district court found that both are foreign sovereigns as contemplated by the FSIA. *Federal Ins. Co.*, No. 92-4177, 1993 WL 21327, at *2-3. Thus, the district court had jurisdiction over all claims against ABP and USA Holding, which are agencies or instrumentalities of a foreign sovereign, pursuant to 28 U.S.C. § 1330. *See Rex v. Cia. Peruana de Vapores, S.A.*, 660 F.2d 61, 64-65 (3d Cir. 1981), *cert. denied*, 456 U.S. 926, 102 S. Ct. 1971 (1982). The district court had supplemental jurisdiction over all other claims pursuant to 28 U.S.C. § 1367. In this appeal, the Dutch parent corporations contend that the district court improperly denied their motions to dismiss or for summary judgment on the grounds of immunity from suit conferred by the FSIA. The parties disagree as to whether this court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

B. *Appellate Jurisdiction*

Ordinarily, we review only "final" decisions of the district court under 28 U.S.C. § 1291. *United States v. Santtini*, 963 F.2d 585, 591 (3d Cir. 1992). A decision is final only when there is a "decision by the district court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Id.* (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521, 108 S. Ct. 1945, 1949 (1988)). However, the Dutch parent corporations contend that the orders denying their motions to dismiss or for summary judgment are appealable as of right under the "collateral order" doctrine articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47, 69 S. Ct. 1221, 1225-26 (1949).

We may exercise jurisdiction over interlocutory appeals, such as the present cases, under the collateral order doctrine only if the order "'[1] conclusively determine[s] the disputed question, [2] resolve[s] an important issue completely separate from the merits of the action, and [3] is effectively unreviewable on appeal from a final judgment.'" *Kulwicki v. Dawson*, 969 F.2d 1454, 1459 (3d Cir. 1992) (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 742, 102 S. Ct. 2690, 2697 (1982)). The case must also present a "serious and unsettled" legal question. *Id.* (quoting *Nixon*).

While recognizing that this court adheres to a restrictive interpretation of the collateral order doctrine, *see Santtini*, 963 F.2d at 592, we conclude that these cases satisfy all three prongs of the *Cohen* test. With respect to the first prong, the class action plaintiffs and Honeywell, Inc., a third-party defendant in all three cases, argue that the orders do not conclusively determine the disputed question of the Dutch parent corporations' negligence. Honeywell further argues that this appeal will not conclusively determine the issue of the Dutch parent corporations' immunity from suit because, as the Dutch parent corporations concede, the district court failed to rule on the applicability of the FSIA "non-commercial tort" exception.

We reject these arguments because they misconceive the disputed legal question being reviewed in this appeal. The district court orders in these three cases conclusively

determined that the Dutch parent corporations are subject to suit. In each case; the district court denied the Dutch parent corporations' motions to dismiss or for summary judgment based on its interpretation of the FSIA given the facts before it. Even though the parties were engaging in additional pre-trial discovery, the district court gave no indication that it would reopen the sovereign immunity issue at a later pre-trial stage of the proceedings. Furthermore, in view of its conclusion that the commercial activity exception applied, the district court had no reason to consider the applicability of the "non-commercial tort" exception as it conclusively determined that the Dutch parent corporations were subject to suit without regard for that exception. Accordingly, if we dismissed these appeals the district court would not have occasion to consider the "non-commercial tort" exception on the immunity issue before trial. The fact that the district court did not engage in an independent legal analysis of the sovereign immunity issue in the class action litigation and Holcombe cases, even though its orders in those cases were issued after the Supreme Court decided *Saudi Arabia v. Nelson*, ___ U.S. ___, 113 S. Ct. 1471 (1993), provides a further indication that the district court considered the matter closed. In short, Honeywell's focus on whether our decision will conclusively determine the immunity question is misdirected because the inquiry regarding a conclusive determination of the disputed question looks to what the district court in fact did, rather than what will be the consequence of the outcome of the appeal.

We find the present appellate jurisdiction issue analogous to that which confronted the Supreme Court in *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806 (1985). In *Mitchell*, the Court held that a district court's denial of a claim of qualified immunity is appealable under the collateral order doctrine to the extent that it turns on issues of law. *Id.* at 526-30, 105 S. Ct. at 2816-17. In this appeal, the Dutch parent corporations only contest issues of law, which brings these cases within the parameter set forth by the Supreme Court in *Mitchell*. Even when the parties dispute material facts that may impact on the immunity determination, we have held that we have appellate jurisdiction over the issue of qualified immunity

under the collateral order doctrine. *Kulwicki*, 969 F.2d at 1460 (an overly "narrow reading of *Mitchell* is not the law of this circuit"); *Chinchello v. Fenton*, 805 F.2d 126, 130-32 (3d Cir. 1986). Hence, we conclude that the district court orders in these three cases conclusively determined that the Dutch parent corporations were amenable to suit. The first prong of the *Cohen* test is met.

Several appellees also contest the second prong of the *Cohen* test. The class action plaintiffs and Honeywell argue that the district court orders do not resolve an issue completely separate from the merits because determining the Dutch parent corporations' status for purposes of immunity requires factual findings that overlap with liability issues. Thus, they argue the appeals should be dismissed because the cases involve "factual and legal 'considerations enmeshed in the merits of the dispute.'" *Santtini*, 963 F.2d at 592 (quoting *Van Cauwenberghe*, 486 U.S. at 528, 108 S. Ct. at 1952). We have not previously addressed this question when reviewing a denial of sovereign immunity under the FSIA. However, the Supreme Court and this court have addressed this issue in the related context of an interlocutory appeal by a government official alleging qualified immunity from suit.

In *Mitchell*, the Supreme Court found that a government official's appeal of a district court's denial of his claim to qualified immunity from suit "easily me[t]" the second prong of the *Cohen* test. 472 U.S. at 527, 105 S. Ct. at 2816. The Court reasoned that:

> a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated. An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law[.] . . . To be sure, the resolution of these legal issues will entail consideration of the factual allegations that make up the plaintiff's claim for relief[.] . . . [However,] the Court has recognized that a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test even

> though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue.

Id. at 527-29, 105 S. Ct. at 2816-17 (citations and footnote omitted).[9] *See also Kulwicki*, 969 F.2d at 1460-61 ("That further facts may surface to produce a contrary result on motions for summary judgment does not deprive the court's earlier decision of its finality under *Cohen*."). We adhere to this reasoning in the sovereign immunity context because some overlap of factual determinations between the separate issues of immunity and liability is inevitable and not enough to deprive this court of appellate jurisdiction. *See Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo Gen.*, 923 F.2d 380, 386 (5th Cir. 1991).

In short, the second prong of the *Cohen* test is met because these appeals involve the Dutch parent corporations' claims to immunity from suit—an important issue that is separate from the liability issues that compose the merits of the suits. With this holding, we adopt the prevalent view that "sovereign immunity is an immunity from trial and the attendant burdens of litigation" on the merits, "and not just a defense to liability on the merits." *Rush-Presbyterian-St. Luke's Medical Ctr. v. Hellenic Republic*, 877 F.2d 574, 576 n.2 (7th Cir.), *cert. denied*, 493 U.S. 937, 110 S. Ct. 333 (1989). *Cf. Mitchell*, 472 U.S. at 527, 105 S. Ct. at 2816 ("qualified immunity is in part an entitlement not to be forced to litigate"); *see also United States v. Moats*, 961 F.2d 1198, 1201 (5th Cir. 1992) ("the purpose behind collateral order appeals from denials of FSIA immunity is to effectuate the guarantee that immune parties will not become embroiled in litigation").

With respect to the third prong of the *Cohen* test, the class action plaintiffs argue that because three of the Dutch parent corporations' subsidiaries will remain as defendants in the case regardless of the outcome of the sovereign immunity question concerning ABP and USA Holding, the

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9. Last term, the Supreme Court extended the *Mitchell* rationale to hold that district court orders denying Eleventh Amendment immunity claims by states or "arms of the state" are immediately appealable under the collateral order doctrine. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, ___ U.S. ___, ___, 113 S. Ct. 684, 687-89 (1993).

Dutch parent corporations will not face any hardship in being subjected to a trial on the merits. In essence, they contend that ABP and USA Holding can appeal the issue of their liability for a final judgment on sovereign immunity grounds after trial. A district court order is "effectively unreviewable only where [it] involves an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 498-99, 109 S. Ct. 1976, 1978 (1989) (citations and internal quotations omitted). *See also Praxis Properties, Inc. v. Colonial Sav. Bank, S.L.A.*, 947 F.2d 49, 58 (3d Cir. 1991).

We agree with the Dutch parent corporations that providing review only after trial would destroy the "legal and practical value" of their sovereign immunity defense. At the post-trial stage of the proceeding, the Dutch parent corporations will have been forced to endure the very burden they are arguing they should not be subjected to in the first place—a trial on the merits. *See Moats*, 961 F.2d at 1203 ("the risk of harm from having to defend the lawsuit remains constant and is an irreparable loss"). Declining to exercise jurisdiction over the purely legal questions concerning the district court's interpretation of the FSIA commercial activity exception would, "in effect, be review denied." *Zosky v. Boyer*, 856 F.2d 554, 561 (3d Cir. 1988), *cert. denied*, 488 U.S. 1042, 109 S. Ct. 868 (1989). Because the legal issues raised in these cases are effectively unreviewable on appeal from a final judgment, the third prong of the *Cohen* test is met.

These cases also meet the final requirement of the *Cohen* test because they involve "serious and unsettled" questions of law. *Kulwicki*, 969 F.2d at 1459. The district court's opinion in the Federal Insurance litigation case was issued on January 26, 1993, approximately two months before the Supreme Court decided *Nelson*, ___ U.S. ___, 113 S. Ct. 1471, an important case interpreting the language of the FSIA commercial activity exception. Hence, the district court did not have the benefit of the Court's *Nelson* opinion as binding or persuasive authority when it ruled on the Dutch parent corporations' motion to dismiss on sovereign immunity grounds. As we previously determined, the

district court relied on the rationale in the Federal Insurance opinion when it later denied ABP's motions in the related cases. Thus, the district court's interpretation of the commercial activity exception is an important and unsettled issue of law pervading these three consolidated cases that must be analyzed in light of *Nelson*.

In holding that these cases involve district court orders that are immediately appealable under the collateral order doctrine, we join every other court of appeals that has decided this question. *See Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F.2d 1375, 1379 n.4 (5th Cir. 1992); *Wellover, Inc. v. Republic of Argentina*, 941 F.2d 145, 147 (2d Cir. 1991), *aff'd*, ___ U.S. ___, 112 S. Ct. 2160 (1992) (the Supreme Court did not address the appellate jurisdiction issue); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450-51 (6th Cir. 1988); *Compania Mexicana de Aviacion, S.A. v. United States Dist. Court for the Cent. Dist. of Cal.*, 859 F.2d 1354, 1358 (9th Cir. 1988); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987). Because we decide that we have appellate jurisdiction over these cases pursuant to the collateral order doctrine, we need not address whether we would have jurisdiction under 28 U.S.C. § 1292.

III. STANDARD OF REVIEW

A determination of the existence of subject matter jurisdiction under the FSIA is a legal question subject to plenary review. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 706 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1812 (1993); *cf. Anthuis v. Colt Indus. Operating Corp.*, 971 F.2d 999, 1002 (3d Cir. 1992) (review of jurisdictional issues is plenary); *Kulwicki*, 969 F.2d at 1461 (review of the legal issue of qualified immunity is plenary). The cases *sub judice* arrive at this court after the district court denied the Dutch parent corporations' motions to dismiss or for summary judgment. The district court's decision in the Federal Insurance litigation case involved a statutory interpretation of the FSIA commercial activity exception that is subject to plenary review. *See Air*

Appendix A

Courier Conf. of Am./Int'l Comm. v. United States Postal Serv., 959 F.2d 1213, 1217 n.3 (3d Cir. 1992).

IV. DISCUSSION

A.

As a preliminary matter, we must address several parties' concerns about the scope of the record that is available to this court when considering these cases on appeal. The three cases consolidated for appeal are related but were not consolidated in the district court for purposes of discovery or trial. The plaintiffs in the class action litigation filed an *amicus curiae* brief in the Federal Insurance litigation case stating that the more complete factual record of the class action litigation was not available to the Federal Insurance plaintiffs at the time briefing on the motion to dismiss in that case was closed. They request that this court consider the factual record in the Federal Insurance litigation to be incomplete.

Furthermore, Honeywell urges this court to consider in this appeal facts developed during the class action discovery which were not presented to the district court during briefing on the motion to dismiss. In the alternative, Honeywell argues that this court must remand the class action case to the district court for it to allow the parties to initiate or expand discovery in order to create a more complete factual record for the district court to rule on the motion to dismiss. Finally, in the Holcombe case Honeywell contends that this court can and should take judicial notice of filings made in other related cases to help resolve that appeal. Before resolving these matters, we will highlight the procedural context in which the motions were considered by the district court.

In the Federal Insurance litigation case, ABP and USA Holding filed their motion to dismiss alleging immunity from suit on October 2, 1992. It appears from the record that no discovery had taken place before the motion was filed, nor was discovery commenced between that date and the date of the district court's decision, January 26, 1993. As previously discussed, the district court denied ABP and

USA Holding's motion to dismiss. *See Federal Ins. Co. v. Richard I. Rubin & Co.*, No. 92-4177, 1993 WL 21327, at *1 (E.D. Pa. Jan. 26, 1993).

ABP filed its motion to dismiss on immunity grounds in the class action litigation on December 23, 1991. This motion was made concurrently with numerous motions to dismiss filed by the other owner/manager defendants, which are not relevant to this appeal. The class action litigation was assigned for discovery purposes to a magistrate judge, who issued a discovery planning and scheduling order on March 16, 1992. The order indicated that the motions to dismiss would be held until completion of the first two stages of discovery. Upon completion, the district court granted in part, and denied in part, the numerous motions to dismiss. *See In re One Meridian Plaza Fire Litig.*, 820 F. Supp. 1460, 1464-65 (E.D. Pa. 1993). The district court denied ABP's motion to dismiss on immunity grounds, incorporating by reference its earlier opinion in the Federal Insurance litigation case. *Id.* at 1491. In this opinion, the district court made no factual findings other than to set out the facts as stated in the class action complaint. *See id.* at 1465-69 & n.3. Thus, we will assume that the district court did not consider the discovery undertaken in the class action litigation when ruling on ABP's motion to dismiss.

The Holcombe case arrives at this court with a distinct procedural history. After removing this case from state court, ABP filed its answer to the complaint on November 15, 1991, in which it alleged immunity from suit pursuant to the FSIA. In response to discovery requests, ABP filed motions for summary judgment and for a protective order on July 14, 1992. ABP submitted affidavits in support of its motions. The parties stipulated that they would not engage in discovery on the merits while the motion for summary judgment was pending, and that the Holcombe plaintiff could seek discovery on the immunity issue before briefing closed. The Holcombe plaintiff filed a response to the summary judgment motion relying on the district court's opinion in the related Federal Insurance litigation case, as well as discovery taken in other related actions. As previously discussed, on May 24, 1993 the district court

denied ABP's motion for summary judgment in a one-page order without opinion.[10]

We draw several conclusions from the district court's disposition of these cases. First, although it did not expressly acknowledge so in the Holcombe case, the district court relied on its opinion in the Federal Insurance litigation case in denying the motion to dismiss in the class action litigation case and the motion for summary judgment in the Holcombe case. Second, the only factual findings made by the district court in denying all three motions were those set out in the Federal Insurance litigation opinion. Thus, we base our review on those limited factual findings made by the district court in the Federal Insurance litigation opinion. With these conclusions in mind, we turn to the arguments made concerning the scope of the records on appeal.

It is a well settled principle of law in this circuit that the court of appeals normally is limited in its review only to those facts developed in the district court. *Clark v. K-Mart Corp.*, 979 F.2d 965, 967 (3d Cir. 1992) (in banc); *Bass v. Attardi*, 868 F.2d 45, 51 (3d Cir. 1989) (per curiam); *United States ex rel. Bradshaw v. Alldredge*, 432 F.2d 1248, 1250 (3d Cir. 1970). As we said in a previous case, "[t]he only proper function of a court of appeals is to review the decision below on the basis of the record that was before the district court." *Fassett v. Delta Kappa Epsilon*, 807 F.2d 1150, 1165 (3d Cir. 1986), *cert. denied*, 481 U.S. 1070, 107 S. Ct. 2463 (1987). While this principle is not without exception, *see Clark*, 979 F.2d at 967 (expanding the record

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10. In this sovereign immunity context, we find little procedural difference between the motions to dismiss in the Federal Insurance litigation and class action litigation cases and the motion for summary judgment in the Holcombe case. *Cf. Ashe v. Corley*, 992 F.2d 540, 544 (5th Cir. 1993) (a motion for summary judgment based solely on the pleadings should be evaluated on the same standards as a motion to dismiss for failure to state a claim); *Carver v. Bunch*, 946 F.2d 451, 455 (6th Cir. 1991) ("the court's inquiry under either 12(b)(6) or 56(c) is identical, with the most significant difference being the type of evidence the court considers in reaching its decision"). The district court may, and in these cases did, consider factual evidence and briefs in support of or against either motion.

to determine whether subsequent events mooted the appeal), we see no reason to create an exception in this appeal. Although we will adhere to the rule that we can only consider record facts as they were developed in the district court in each case, we recognize that we have the power to take judicial notice of subsequent developments in related proceedings since the appeal in each case was filed. *See Landy v. Federal Deposit Ins. Corp.*, 486 F.2d 139, 150-51 (3d Cir. 1973), *cert. denied*, 416 U.S. 960, 94 S. Ct. 1979 (1974).

Turning to the matters raised in this appeal, we will decide the Federal Insurance litigation case only on facts contained in that record. Since we will reverse the district court's order in that case solely on its interpretation of law, on remand it is for the district court to determine whether the factual record is sufficient for it to rule on other jurisdictional theories.[11] We decline Honeywell's invitation to consider evidence that was discovered in the class action litigation but that was not relied upon by the district court in denying ABP's motion to dismiss in that case. Again, it is a matter for the district court on remand to decide what evidence it should consider with respect to the motions to dismiss. Finally, with respect to the Holcombe case, we agree with Honeywell that we have the power to take judicial notice of subsequent developments in related cases. However, since we will reverse the district court only on its interpretation of law as articulated in the Federal Insurance litigation opinion, taking judicial notice of related facts and developments would not assist our limited review.

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11. We agree with other courts of appeals that sovereign immunity is a "critical preliminary determination" of subject matter jurisdiction for which the parties should be granted a fair opportunity to engage in jurisdictional discovery so as to adequately define and submit to the court facts necessary for a thorough consideration of the issue. *E.g., Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 449 (D.C. Cir. 1990); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988). However, we caution that "discovery and fact-finding should be limited to the essentials necessary to determining the preliminary question of jurisdiction." *Gould*, 853 F.2d at 451.

Appendix A

B.

This appeal presents several issues with respect to the applicability of the commercial activity exception to the Foreign Sovereign Immunities Act. In all three cases that are the subject of this appeal, the district court ruled that it had jurisdiction over the Dutch parent corporations by virtue of their commercial activity. However, the district court only articulated its reasoning in the Federal Insurance litigation case. *See Federal Ins. Co.*, No. 92-4177, 1993 WL 21327. Therefore, we will only address the district court's interpretation of the FSIA commercial activity exception as set forth in that opinion.

In the Federal Insurance litigation case, the Dutch parent corporations raised the issue of immunity from suit in their motion to dismiss. Initially, the district court had to determine whether ABP and USA Holding were "foreign states" entitled to immunity under the FSIA. *See id.* at *2-3; 28 U.S.C. § 1603(a). The district court found that both ABP and USA Holding are foreign states within the meaning of the FSIA,[12] and, therefore, are entitled to a presumption of

12. As noted previously, none of the various parties dispute this determination on appeal. Judge Greenberg points out that while none of the parties contended in the district court and none have contended on this appeal that USA Holding is not a foreign state this assumption might not be correct. If USA Holding is a foreign state it can only be by reason of its ownership by ABP which is an agency or instrumentality of the Dutch government. But Judge Greenberg believes that a reasonable inference might be drawn that the term "foreign state" in 28 U.S.C. § 1603(b)(2) does not include an entity which is a foreign state only because it is an agency or instrumentality of a foreign state. He reasons that if "foreign state" in section 1603(b)(2) includes an "agency or instrumentality" of a foreign state then it must also include a "political subdivision" of a foreign state yet section 1603(b)(2) expressly provides that an "agency or instrumentality" may be an "organ of" or be owned by a "political subdivision" of a foreign state. In this regard he points out that section 1603(a) expressly provides that "foreign state" includes both political subdivisions and agencies or instrumentalities. Thus, a reasonable inference can be drawn that the term "political subdivision" must have been used in section 1603(b)(2) because "foreign state" in that section did not include a "political subdivision thereof." Otherwise the term "political subdivision" in section 1603(b)(2) is superfluous.

immunity. *Federal Ins. Co.*, No. 92-4177, 1993 WL 21327, at *3. Although the burden then shifted to the plaintiffs to establish that one of the exceptions to immunity applied, *id.*, we agree with the district court that the ultimate burden of proving immunity from suit lies with the Dutch parent corporations. *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6616;[13] *Gerding v. Republic of France*, 943 F.2d 521, 525-26 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1812 (1993); *Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 289 n.6 (5th Cir. 1989) (per curiam). The Dutch parent corporations need not, however, plead and prove that each FSIA exception does not apply. *Gerding*, 943 F.2d at 526; *Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo Gen.*, 923 F.2d 380, 390 n.14 (5th Cir. 1991).

The Federal Insurance plaintiffs alleged that the district court had subject matter jurisdiction with respect to the Dutch parent corporations under the commercial activity exception. *See* 28 U.S.C. § 1605(a)(2). This provision states that:

Furthermore, it can be argued reasonably that Congress by the inclusion of "political subdivision" and the omission of "agency or instrumentality" in section 1603(b)(2) intended to distinguish between these types of entities, the inference being that the former but not the latter could own an entity which could be regarded as an agency or instrumentality of a foreign state. Judge Greenberg nevertheless joins in this opinion without reservation because this issue has not been preserved in this litigation.

13. This House report reflects Congress' intent to create a burden-shifting process when foreign states plead a defense of immunity under the FSIA.

> [The FSIA] starts from a premise of immunity and then creates exceptions to the general principle. . . . Once the foreign state has produced [] prima facie evidence of immunity, the burden of going forward [] shift[s] to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity [] rest[s] with the foreign state.

H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6616.

Appendix A

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case ... in which the action is based upon [1] a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Id. Our discussion of the applicability of this exception in the Federal Insurance litigation case will follow the analysis employed by the district court.

1. Commercial Activity of USA Holding

In analyzing the commercial activity exception with respect to USA Holding, the district court first found that USA Holding engaged in commercial activity as defined in the FSIA by virtue of its ownership interest in USA One B.V. and USA Two B.V., which were incorporated in the Netherlands to invest in U.S. real estate. *Federal Ins. Co.*, No. 92-4177, 1993 WL 21327, at *5. Second, the district court concluded that this commercial activity was sufficient to constitute "commercial activity carried on in the United States," 28 U.S.C. § 1605(a)(2), within the meaning of the first clause of the FSIA commercial activity exception. *Federal Ins. Co.*, No. 92-4177, 1993 WL 21327, at *5. As noted by the district court, *see id.*, and discussed by the Supreme Court in *Nelson*, *see* __ U.S. at __, 113 S. Ct. at 1477, such commercial activity is defined by the statute as "commercial activity carried on by [the foreign] state and having substantial contact with the United States." 28 U.S.C. § 1603(e).

The district court found that USA Holding engaged in commercial activity by forming two wholly owned subsidiaries—USA One B.V. and USA Two B.V. *Federal Ins. Co.*, No. 92-4177, 1993 WL 21327, at *5. The district court then concluded that this ownership interest resulted in transactions having a substantial connection with the

United States through the further formation of the subsidiary partnership USA One Associates, which was established in Pennsylvania to purchase and own U.S. real estate. *Id.* In essence, the district court held that USA Holding had waived its entitlement to sovereign immunity under the FSIA by virtue of its status as a parent to USA One B.V. and USA Two B.V., which in turn formed USA One Associates to acquire a significant ownership interest in the partnership that owns One Meridian Plaza, a United States real estate venture. *Id.*

The district court erred by interpreting the first clause of the commercial activity exception in an overbroad manner so as to allow for subject matter jurisdiction based on *any* commercial activities undertaken by the Dutch parent corporations with a connection to the United States. We adopt a two-part test when determining whether a foreign state's commercial activities are sufficient to deprive it of sovereign immunity under the FSIA commercial activity exception. Under this test, the initial inquiry is whether there is a sufficient jurisdictional connection or nexus between the commercial activity and the United States. The second inquiry is whether there exists a substantive connection or nexus between the commercial activity and the subject matter of the cause of action.

In order for the district c .rt to have jurisdiction under the first clause of the commercial activity exception, the foreign state (USA Holding) must have carried on commercial activity directly in the United States, or it must have carried on commercial activity with a substantial connection to the United States. As a factual finding, the district court concluded only that the commercial activity undertaken by USA Holding was the formation of two wholly owned Dutch subsidiaries (USA One B.V. and USA Two B.V.), *id.*, which certainly was not activity undertaken directly in the United States. Nevertheless, the district court attributed the commercial activities undertaken by USA One B.V., USA Two B.V., and USA One Associates in the United States, with respect to managing and operating One Meridian Plaza, to their parent corporation USA Holding, thereby finding that USA Holding engaged in commercial activity with a substantial connection to the United States.

Such an inference by the district court violates the important principle that the acts of separate corporations established by foreign governments should not be attributed to related foreign entities unless doing so would "work fraud or injustice." *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 624-29, 103 S. Ct. 2591, 2598-601 (1983) ("*Bancec*").

In *Bancec*, the Supreme Court held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-27, 103 S. Ct. at 2600. Although this principle initially was articulated in a case involving a determination of substantive liability, not a specific application of the FSIA commercial activity exception, courts of appeals consistently have relied on this presumption when making an FSIA jurisdictional determination through the application of 28 U.S.C. § 1605(a)(2). *E.g., Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F.2d 1375, 1382 (5th Cir. 1992) ("The broader principles upon which *Bancec* was based ... are undoubtedly relevant whenever a plaintiff seeks to disregard a foreign government instrumentality ...."); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 533 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 413 (1992); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 446-47 (D.C. Cir. 1990); *Hercaire Int'l, Inc. v. Argentina*, 821 F.2d 559, 564-65 (11th Cir. 1987). As noted by the *Foremost-McKesson* court, the Restatement directs that " '[w]hen a state instrumentality is not immune ..., for instance because the claim arises out of a commercial activity, the claim is *ordinarily to be brought only against the instrumentality*.' " 905 F.2d at 446 (quoting 1 Restatement (Third) of the Foreign Relations Law of the United States § 452 cmt. c (1987) (emphasis added in *Foremost-McKesson*)).

In the present case, the instrumentalities that engaged in commercial activities in the United States were USA One B.V., USA Two B.V., and USA One Associates, not USA Holding. The district court erred by ignoring the separate juridical status of the various entities and finding USA Holding responsible for the activities engaged in by its

related subsidiaries. We recognize that there are two major exceptions to the *Bancec* rule, namely, the independent corporate status of government-owned entities should be disregarded (1) "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created;" or (2) where to give effect to the separate instrumentalities "'would work fraud or injustice.'" 462 U.S. at 629, 103 S. Ct. at 2601 (quoting *Taylor v. Standard Gas & Elec. Co.*, 306 U.S. 307, 322, 59 S. Ct. 543, 550 (1939)). *See also Hercaire*, 821 F.2d at 565; *de Letelier v. Republic of Chile*, 748 F.2d 790, 794 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125, 105 S. Ct. 2656 (1985). However, the district court never articulated factual findings or a legal justification sufficient for this court to uphold disregarding the independent juridical status of USA One B.V., USA Two B.V., and USA One Associates. Thus, the district court erred when it attributed the commercial activities of USA One Associates, the Pennsylvania partnership, and USA One B.V. and USA Two B.V., the Netherlands corporations, undertaken in the United States, to their parent USA Holding.

In short, the single act of creating two Dutch corporations, which later formed a U.S. partnership to acquire a significant ownership interest in One Meridian Plaza, was insufficient commercial activity for the district court to conclude it had subject matter jurisdiction over USA Holding.[14] We hold that a district court cannot exercise jurisdiction over a foreign state under the first clause of the FSIA commercial activity exception unless it finds a sufficient jurisdictional connection or nexus between the commercial activity engaged in by that particular foreign entity and the United States.

We also hold that the district court erred in not undertaking an analysis to determine whether a

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14. The parties do not dispute that USA One Associates, a Pennsylvania partnership that owns 65% of One Meridian Plaza by virtue of its ownership interest in E/R Associates, engaged in commercial activity in the United States sufficient for jurisdiction. Likewise, the parties do not dispute that USA One B.V. and USA Two B.V. relinquished their right to sovereign immunity by engaging in commercial activities in the U.S.

substantive connection or nexus exists between the commercial activity that USA Holding engaged in and the cause of action alleged. Such an undertaking is made necessary by the language of the statute, which allows for an exception to sovereign immunity only when "the action is *based upon* a commercial activity carried on in the United States." 28 U.S.C. § 1605(a)(2) (emphasis added). Although we have had few occasions to interpret the language of the FSIA commercial activity exception, we have held that the claims alleged in the complaint must be "based upon" commercial activities undertaken by the foreign state as contained in the record. *See Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 272 (3d Cir. 1980). We reiterate that holding today and announce that the district court must undertake an analysis and determine that the cause of action has a substantive connection to the commercial activities engaged in by the foreign state before it exercises jurisdiction under the commercial activity exception to the FSIA.

In adhering to this interpretation of the statute, we follow several other courts of appeals which require the actual legal claims being pursued to have arisen materially from the commercial activity undertaken by the foreign state. *E.g., Siena Reder*, 923 F.2d at 387 (5th Cir. 1991) ("In order to satisfy the commercial activities exception to sovereign immunity, the commercial activity that provides the jurisdictional nexus with the United States must also be the activity on which the lawsuit is based."); *Compania Mexicana de Aviacion, S.A. v. United States Dist. Court for the Cent. Dist. of Cal.*, 859 F.2d 1354, 1360 (9th Cir. 1988); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 452 (6th Cir. 1988); *Barkanic v. General Admin. of Civil Aviation of the Peoples Republic of China*, 822 F.2d 11, 13 (2d Cir.), *cert. denied*, 484 U.S. 964, 108 S. Ct. 453 (1987); *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 n.22 (D.C. Cir. 1982) ("Section 1605's 'based upon' standard is satisfied if plaintiff can show a direct causal connection between [the foreign entity's commercial activity in the United States] and the [acts] giving rise to his claims . . . ."). Several district courts in this circuit also have adopted this interpretation of the statutory language. *See Tote v. Iberia Int'l Airlines*, 649 F. Supp. 41, 42-43 (E.D. Pa. 1986);

National Expositions, Inc. v. DuBois, 605 F. Supp. 1206, 1209 & n.7 (W.D. Pa. 1985).

The Supreme Court recently agreed with this interpretation of the "based upon" language of the commercial activity exception in *Saudi Arabia v. Nelson*, ___ U.S. ___, 113 S. Ct. 1471 (1993). In *Nelson*, a U.S. citizen sued the Kingdom of Saudi Arabia and its state-run hospital for tortious injuries resulting from his employment at the hospital. *Id.* at __, 113 S. Ct. at 1474-76. Nelson was recruited and offered employment through an independent corporation doing business in the United States on behalf of Saudi Arabia. *Id.* While the district court dismissed the complaint for lack of subject matter jurisdiction under the FSIA, the U.S. Court of Appeals for the Eleventh Circuit reversed, finding that Nelson's recruitment and hiring were commercial activities undertaken by Saudi Arabia. *Id.* at __, 113 S. Ct. at 1476. The appellate court also concluded that Nelson's tort claims were "based upon" these activities within the meaning of the FSIA commercial activity exception.

The Supreme Court reversed, finding that Nelson's cause of action was not "based upon a commercial activity" within the meaning the statute. *Id.* at __, 113 S. Ct. at 1481. The Court interpreted the term "based upon" to require the plaintiff's lawsuit to involve a claim that materially results from conduct that constitutes the defendant's commercial activity in the United States. *Id.* at __, 113 S. Ct. at 1477. While the Court conceded that the recruitment and hiring "activities led to the conduct that eventually injured [Nelson], they are not the basis for [the] suit." *Id.* at __, 113 S. Ct. at 1478. In order to be a basis for the suit, the activities must involve "elements of a claim that, if proven, would entitle the plaintiff to relief under his theory of the case." *Id.* at __, 113 S. Ct. at 1477. Nelson's suit involved claims of tortious conduct, not a breach of the contract the parties entered into as a result of Saudi Arabia's commercial activities of recruiting and hiring in the United States. *Id.* at __, 113 S. Ct. at 1478. The Supreme Court also concluded that "tortious conduct itself fails to qualify as 'commercial activity' within the meaning of the Act." *Id.*

The *Nelson* case is instructive because it makes clear that the commercial activity undertaken by the defendant must be directly connected to the cause of action alleged by the plaintiff. In short, the cause of action must arise directly from the defendant's commercial activities in the United States in order for the first clause of the commercial activity exception to apply. Turning to the facts before us, many claims are alleged against the owner/manager defendants in these consolidated cases. These claims are primarily tort claims—allegations phrased in terms of negligence, gross negligence, recklessness, nuisance, and strict liability that the defendants breached various duties and standards of care with respect to maintaining electrical and fire detection systems, inspecting the building, and failing to warn plaintiffs, among many others. These claims are not "based upon" USA Holding's sole commercial activity of forming two Dutch subsidiary corporations that eventually invested in One Meridian Plaza through a U.S. subsidiary.[15] The plaintiffs would not need to prove that USA Holding formed two wholly-owned Dutch subsidiaries to invest in U.S. real estate in order to prevail on their tort claims. Thus, the plaintiffs' claims are not "based upon" USA Holdings' commercial activity—such activity is irrelevant to the tort claims because it does not form any "basis" or "foundation" of the claims. *See id.* at __, 113 S. Ct. at 1477 (quoting Black's Law Dictionary 151 (6th ed. 1990)).

The various plaintiffs argue that the district court's decision should be affirmed by attempting to cast the determination as one that can be disturbed only if it was clearly erroneous. In support of this position, the plaintiffs argue that the district court's conclusions that the Dutch defendants engaged in commercial activity that had a substantial connection with the United States were factual findings amply supported by the record. This argument misconceives the underlying issue, i.e., whether the district

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15. In one count, the Federal Insurance plaintiffs did allege a breach of contract by the owner/manager defendants. However, this claim does not concern the formation of the Dutch subsidiaries—it involves a lease entered into between the defendants and plaintiffs' subrogors which required the owner/manager defendants to assure that the building remained in compliance with national, state, and local fire safety codes.

court used the correct legal standard when determining if the commercial activity exception applies. The district court committed an error of law, over which we have plenary review, when determining that the commercial activity exception did apply.

In addition, the various plaintiffs argue that the *Nelson* case is distinguishable because the claim involved tortious conduct undertaken by the sovereignty itself, rather than a claim resulting from its corporate governmental instrumentality engaging in investment activities. They argue that *Nelson* is relevant only to the extent it defines and discusses "commercial activity" for purposes of the commercial activity exception. This argument fails because *Nelson* explicitly involved an interpretation of the "based upon" language as used by Congress in the statute. *Id.* at __, 113 S. Ct. at 1477-78. This section of the opinion is central to the Court's holding and provides a directive concerning the statute that we are compelled to follow.

2. Commercial Activity of ABP

With respect to ABP, the district court found that it had jurisdiction over this defendant under two distinct theories. First, the district court found that it had subject matter jurisdiction under the third clause of the commercial activity exception because ABP engaged in commercial acts outside the U.S. that had a direct effect inside the U.S. *Federal Ins. Co.*, No. 92-4177, 1993 WL 21327, at *5-6 (citing 28 U.S.C. § 1605(a)(2); *Republic of Argentina v. Weltover, Inc.*, __ U.S. ___, __, 112 S. Ct. 2160, 2168 (1992)). The second and alternative theory relied upon by the district court is that "piercing the corporate veil" from USA Holding to ABP reveals that the two should be considered one corporate entity for purposes of FSIA analysis. *Id.* at *6 (citing *Bancec*). The district court erred with respect to both theories.

We must reject the district court's second theory of jurisdiction over ABP because we have already determined that on this record the court erred as a matter of law in concluding that USA Holding relinquished its sovereign immunity. Thus, even if the district court's conclusion that

it would further a fraud or be unjust to adhere to the presumption of the Dutch corporations' independent juridical status was correct,[16] piercing the corporate veil from USA Holding to ABP would not provide a sufficient basis for jurisdiction over ABP.

With respect to the district court's first theory, it has no subject matter jurisdiction over ABP under the third clause of the commercial activity exception because the claims

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16. We need not, and do not, express any opinion as to whether the district court was correct in concluding that it would work a fraud or be unjust to adhere to the corporate separateness of ABP and USA Holding on this record. However, we feel compelled to clarify a point of law relied on by the district court in its analysis. The district court cited *Bancec*, 462 U.S. at 629, 103 S. Ct. at 2601, just prior to stating that ABP should not be allowed to utilize the FSIA "to circumvent its obligations for violations of the United States laws, while nevertheless reaping the benefits of investing in United States property." *Federal Ins. Co.*, No. 92-4177, 1993 WL 21327, at *7. In *Bancec*, the Supreme Court held that the presumption of separateness could be ignored to avoid the injustice of "permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law." 462 U.S. at 633-34, 103 S. Ct. at 2603. While the Court declined to announce a rigid test for determining when it is appropriate to ignore the separate juridical status of foreign entities, *id.* at 633, 103 S. Ct. at 2603, we do not believe the district court's articulation of its rationale to be wholly consistent with *Bancec*.

At the core of the Court's concern in *Bancec* was Cuba's ability to obtain relief in a U.S. court in a related proceeding, while simultaneously avoiding liability on a counterclaim through the creation of a separate juridical entity that could not satisfy any judgment. *Id.* at 630-34, 103 S. Ct. at 2602-03. Unlike Cuba in the *Bancec* case, the Netherlands is not engaged in any related litigation in the United States as a plaintiff. The Dutch parent corporations are not using our courts to pursue any legal remedy stemming from the fire. However, the district court inherently found the benefits received by ABP from its subsidiaries' real estate investments to be similar to the benefits a foreign state would receive from bringing a suit in the United States. Making a loan to a subsidiary which uses the funds to invest in income-producing real estate to repay the principal and interest is a commercial transaction that is completely different from filing suit in the U.S. to seek a remedy. The district court's reasoning seems to be an extension of the *Bancec* rationale that is not principled and, as far as we have found, is without support in the case law.

alleged were not "based upon" acts performed "in connection with" ABP's commercial activity. *See Nelson*, __ U.S. at __, 113 S. Ct. at 1478. The district court found that ABP engaged in the following commercial activities: (1) it provided an unsecured loan to USA One Associates for the purpose of financing the acquisition of a sixty-five percent interest in the partnership that owns One Meridian Plaza; and (2) the loan terms were negotiated and executed in the Netherlands, with payments to be made to ABP by its subsidiary in the Netherlands in U.S. dollars. *Federal Ins. Co.*, No. 92-4177, 1993 WL 21327, at *1, *6. While negotiating and executing a loan is a contractual transaction that is commercial activity for purposes of the FSIA, *see Stena Rederi*, 923 F.2d at 387 n.9, again, as with USA Holding, the legal claims did not arise from these commercial activities.

The various plaintiffs allege several tort-based theories of recovery stemming primarily from the design and construction of the building, as well as from the improper maintenance and operation of the building. The theory underlying all these claims is that One Meridian Plaza was managed in such a fashion as to ignore local, state, and national fire codes, which resulted in a fire causing numerous injuries to the various plaintiffs. The district court erred because these claims did not arise from the loan transaction that it found to be ABP's only commercial activity under the FSIA.

In *Nelson*, the Supreme Court noted that Congress made an important distinction between the first clause of the FSIA commercial activity exception and the second and third clauses. The Court theorized that there might be an important "difference between a suit 'based upon' commercial activity and one 'based upon' acts performed 'in connection with' such activity." __ U.S. at __, 113 S. Ct. at 1478. The second and third clauses of the FSIA commercial activity exception use the "in connection with" language, which arguably might allow for a more tenuous causal link between the claims alleged and the commercial activities. The Court did not describe the extent of a substantive connection required under the second and third clauses of the commercial activity exception in *Nelson* because the

case raised an issue only under the first clause of the exception.

The present case raises an issue as to the required substantive nexus under the third clause of the FSIA commercial activity exception because the district court expressly relied on this clause for jurisdiction over ABP. *Federal Ins. Co.*, No. 92-4177, 1993 WL 21327, at *5-6. The district court concluded that it had jurisdiction over ABP as a financier "because USA One Associates' acquisition of a majority interest in the Meridian building followed as an 'immediate consequence' of this loan transaction." *Id.* at *6. The plaintiffs argue that the district court's interpretation was correct because the loan from ABP funded the acquisition of One Meridian Plaza; thus, the purchase followed "as an immediate consequence" of ABP's commercial activity. *See Weltover*, __ U.S. at __, 112 S. Ct. at 2168.

In *Weltover*, the Supreme Court indicated that the foreign sovereign's commercial activity must have a "direct effect" in the United States in order for a court to have jurisdiction under the third clause of the FSIA commercial activity exception. *Id.* However, in that case it was uncontested that the cause of action was "based upon" a commercial activity undertaken outside the U.S. *Id.* at __, 112 S. Ct. at 2165. The claims in *Weltover* involved allegations of breach of contract due to the rescheduling of the maturity dates on government bonds, which was the commercial activity undertaken by Argentina, the foreign state, for jurisdictional purposes. *Id.* at __, 112 S. Ct. at 2164-65. Hence, the substantive connection between the commercial activity and the claims alleged was not in issue.

Weltover does not stand for the proposition that jurisdiction lies under the third clause of the FSIA commercial activity exception if the foreign state undertakes commercial activity outside the U.S. that has a direct effect inside the U.S. when the cause of action is not causally linked to the commercial activity. In the present case, ABP did undertake commercial activity in the Netherlands by means of providing a loan to USA One Associates and collecting payments on that loan. That activity did have a direct effect in the United States because

the loan provided capital for USA One Associates to acquire a majority interest in One Meridian Plaza.

Nevertheless, the causes of action alleged in the lawsuit are not substantively connected to the loan transaction. As previously discussed, the claims are primarily tort-based and do not include a breach of contract allegation stemming from the loan transaction. There is no substantive nexus that satisfies the "based upon" requirement contained in the statutory language. Therefore, *Weltover* does not provide persuasive authority for the plaintiffs' argument that subject matter jurisdiction lies under the third clause of the FSIA commercial activity exception. In sum, the district court erred in concluding that it had subject matter jurisdiction over ABP under the third clause of the commercial activity exception because the claims alleged in the lawsuit were not "based upon" ABP's commercial loan transaction with its subsidiary USA One Associates.

V. CONCLUSION

We will reverse the orders of the district court in all cases consolidated for appeal. The district court erred in its interpretation of the FSIA commercial activity exception in the Federal Insurance litigation opinion because the claims alleged did not arise from the commercial activities undertaken by the Dutch parent corporations as found by the court. With respect to USA Holding, the district court also erred in concluding that this entity engaged in commercial activity in the United States sufficient for jurisdiction. We will reverse the orders of the district court in the class action litigation and the Holcombe cases because the court relied on the reasoning contained in the Federal Insurance litigation opinion when denying ABP's motions. We will remand these cases to the district court for further proceedings consistent with this opinion. To the extent that the plaintiffs raised the "non-commercial tort" exception in response to the motions to dismiss and for summary judgment, they may again assert that exception on remand.

Appendix A

Costs will be taxed in all of these consolidated cases against the appellees.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED APRIL 14, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 91-2171

CONSOLIDATED WITH
CIVIL ACTION NOS.

91-2172
91-2226
91-2227
91-2374
91-2545
91-2546
91-2547

IN RE: ONE MERIDIAN PLAZA FIRE LITIGATION

MEMORANDUM

BUCKWALTER, J. April 14, 1993

I. Introduction

This litigation arose as a result of a fire at the One Meridian Plaza building in downtown Philadelphia which began on February 23, 1991. Various parties, none of whom were tenants of One Meridian Plaza at the time of the fire, have brought claims for uninsured losses. All of the initial complaints filed in the above cases were consolidated into the "One Meridian First Consolidated

Amended Class Action Complaint" (hereinafter the "Complaint"). Each of the defendants has filed a separate motion to dismiss the Complaint, a motion for a more definite statement, a motion to strike, or some combination thereof (hereinafter simply "motions to dismiss").[1]

Each motion contains numerous sections. Many of these sections are common to many or all of the motions to dismiss. In addition, some defendants have raised arguments which, although not raised by other defendants, apply to other defendants. Wherever any defendant's motion demonstrates that plaintiffs have failed to state a claim against all defendants, the dismissal of the claim will apply to all defendants. Where a defendant makes an argument on its own behalf only, of course, the portion of this opinion which discusses that argument will apply only to that defendant. In the end, each defendant stands alone and the order following this opinion reflects the differences in the resolution of issues as applicable to each defendant.

The facts of the case are common to all defendants' motions. Where necessary, facts applicable only to a specific defendant are included in the section of the opinion corresponding to that defendant and its motion. The standard of review in a motion to dismiss, of course, is the same for all defendants and all of the instant motions. When reference is made to a "defendant's memorandum," (i.e. "Delmont's Memorandum" or "Balis' Memorandum") it is to that defendant's memorandum in support of its motion to dismiss. Plaintiff has responded with one collective memorandum in opposition to all of the motions. When reference

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1. Several defendants filed a motion to dismiss before the plaintiffs filed their amended, consolidated complaint. Those motions to dismiss have been replaced by the instant motions and are denied as moot.

is made to "Plaintiffs' Memorandum," it is to that collective memorandum.

Subsequent to the filing of these motions, plaintiffs' response and defendants' replies, plaintiffs filed a motion to amend the Complaint.[2] The proposed second amended complaint, attached to plaintiffs' motion, has indicated plaintiffs' acquiescence to the dismissal of the following:

1. All claims by Constitution Bancorp., N.A. and Louis J. Boundonna;

2. All allegations against "potential co-defendants";

3. Certain allegations which defendants characterized as irrelevant and impertinent.

Thus, these matters, all of which were raised in the motions to dismiss, are dismissed.

II. Facts

This litigation arose from the fire which occurred on Saturday, February 23, 1991, at the One Meridian Plaza building ("One Meridian" or "the Building") in downtown Philadelphia. Since the fire, One Meridian has been shut down, as has Two Mellon Bank Center ("Two Mellon"), which is adjacent to One Meridian. The City of Philadelphia barred access to an area surrounding the Building for some time after the fire due to the threat of falling granite or other debris.

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2. This motion has been denied without prejudice.

Appendix B

A. The Parties

There are numerous plaintiffs and defendants, and it is important to identify all of them in order to resolve the motions to dismiss[3]. It is also important to note whether the plaintiffs sustained any property damage as a direct result of the fire, the (potential) classes of which each plaintiff is a member[4], and which causes of action they assert.

Plaintiffs:

1. Ejay Travel, Inc. ("Ejay"): It is alleged that Ejay is a corporation which leased space near One Meridian, and that water and debris entered and damaged Ejay's premises as well as its business furniture equipment and records. (¶ 3)[5]. The threat of falling debris and the closure of the street on which Ejay is located prevented Ejay from repairing its premises and resuming business. Ejay is a member of proposed Classes C, D, and E and asserts all causes of action in the Complaint against defendants.

2. Nancy Dembowski ("Dembowski"): It is alleged that Dembowski's place of employment was located at One Meridian and that personal property located at her place of employment was destroyed. (¶ 4). She is a member of proposed Classes A, D and E and asserts all causes of action in the Complaint against defendants.

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3. The factual narrative, as well as the identification of the parties is taken from the Complaint.

4. A motion for class certification filed by plaintiffs is currently pending before this court.

5. Paragraph references throughout this opinion are to the Complaint.

Appendix B

3. Virginia L. Grandy ("Grandy"): It is alleged that Grandy's place of employment was located at One Meridian and that personal property located at her place of employment was destroyed. (¶ 5). She is a member of proposed Classes A, D and E and asserts all causes of action in the Complaint against defendants.

4. T. Sean Crumlish ("Crumlish"): It is alleged that Crumlish is an employee and sales representative of Equitrac Corp., and was a provider of goods and services to tenants of One Meridian and Two Mellon, and that personal property belonging to him was destroyed or lost. (¶ 6). He also lost commissions, income, and actual and potential clients and business. He is a member of proposed Classes A, D and E and asserts all causes of action in the Complaint against defendants.

5. Robert Allen ("Allen"): It is alleged that Allen's place of employment was located at One Meridian, and that he suffered damage to his personal property and economic harm. (¶ 9). Allen is a member of proposed Classes A, D, and E and asserts all causes of action in the Complaint against defendants.

6. Regent 15th Street, Inc., d/b/a Giorgio Brutini ("Regent Shoes"): It is alleged that Regent Shoes is a corporation which rented and operated a commercial establishment near One Meridian until the fire, and that it suffered physical harm to its business premises, furniture, equipment, inventory and other personal property as well as business loss and interruption. (¶ 10). Regent Shoes is a member of proposed Classes C, D, and E and asserts all causes of action in the Complaint against defendants.

7. LegXpress, Inc. ("LegXpress"): It is alleged that LegXpress is a corporation which operated a hosiery store located

near One Meridian. LegXpress has alleged business loss and interruption but no property damage. (¶ 11). It is a member of proposed Class E and asserts only Count VI (public nuisance) of the Complaint against defendants.

8. Pennsylvania Square Corp. ("Square Corp."): It is alleged that Square Corp. is a corporation which operated parking facilities for the general public near One Meridian. Square Corp. has alleged business loss and interruption but no property damage. (¶ 12). Square Corp. is a member of proposed Class E and asserts only Count VI (public nuisance) of the Complaint against defendants.

9. Anthony Vinciguerra ("Vinciguerra"): It is alleged that Vinciguerra leased and occupied space in Two Mellon at the time of the fire and that his space and business was "touched and physically invaded by water, smoke and airborne toxins and the ingress and egress to plaintiff's space and business was physically blocked by barricades and other fire safety equipment or materials." (¶ 13). Vinciguerra is a member of proposed Classes B, C, D, and E and asserts all causes of action in the Complaint against defendants.

10. John M. Corcoran ("Corcoran"): It is alleged that Corcoran leased and occupied space and conducted business in Two Mellon at the time of the fire and that his space and business was 'ouched and physically invaded by water, smoke and airborne toxins and the ingress and egress to plaintiff's space was physically blocked. (¶ 14). Corcoran is a member of proposed Classes B, C, D, and E and asserts all causes of action in the Complaint against defendants.

11. Sunshine Personnel, Inc. ("Sunshine"): It is alleged that Sunshine is a corporation which leased premises in the area of

Philadelphia closed to pedestrian and vehicular traffic. (¶ 15). Sunshine has alleged business interruption and damage to its business but no property damage. Sunshine is a member of proposed Classes D and E and asserts all causes of action in the Complaint against defendants.

12. Royal Bank of Pennsylvania ("Royal Bank"): It is alleged that Royal Bank is a corporation which leased premises in the area of Philadelphia closed to pedestrian and vehicular traffic, and that it incurred physical harm to its business premises, furniture, equipment inventory and suffered other personal and real property damage. (¶ 16). Royal Bank is a member of proposed Classes C, D, and E and asserts all causes of action in the Complaint against defendants.

13. Robert J. Atlee ("Atlee"): It is alleged that Atlee's place of employment was located at One Meridian, that personal property owned by him was destroyed and that he lost his employment as a result of the fire. (¶ 17) He is a member of proposed Classes A, D, and E and asserts all causes of action in the Complaint against defendants.

14. Triumphe Financial Services ("Triumphe"): It is alleged that Triumphe is a corporation which provided various financial, accounting and computing goods and/or services to occupants of the Building. (¶ 18). Triumphe has alleged lost income and actual and potential clients and business but no property damage. It is a member of proposed Classes C, D, and E and asserts all causes of action in the Complaint against defendants.

15. C.W.D. Enterprises Ltd. d/b/a Chris' Cafe and Bar ("Chris' Cafe"): It is alleged that Chris' Cafe suffered smoke and odor damage to its property and premises, which is located near

One Meridian, and also suffered business loss and interruption and damage to its business as a result of the fire. (¶ 19). It is a member of proposed Class E and asserts only Count VI (public nuisance) of the Complaint against defendants.

16. The Happy Rooster, Inc. ("The Happy Rooster"): It is alleged that the Happy Rooster is a corporation which suffered smoke and odor damage to its property and premises which is located near One Meridian. (¶ 20). It also alleges business interruption and damage to its business as a result of the fire. It is a member of proposed Class E and asserts only Count VI (public nuisance) of the Complaint against defendants.

Potential Plaintiff Classes[6]:

Class A: This class includes persons or entities who owned or leased property located in One Meridian which was damaged by the fire or efforts to suppress the fire or conditions that existed in the aftermath of the fire. (¶ 40a).

Class B: This class includes persons or entities who owned or leased property located in Two Mellon which was damaged by the fire or efforts to suppress the fire or conditions that existed in the aftermath of the fire. (¶ 40b).

Class C: This class includes persons or entities who owned or leased property outside of One Meridian and Two Mellon which was damaged by the fire or efforts to suppress the fire or conditions that existed in the aftermath of the fire. (¶ 40c).

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6. Every class specifically excludes the tenants of One Meridian Plaza, all defendants named, and unnamed additional defendants in this action, their parents, subsidiaries, affiliates, officers, directors, shareholders, representatives and agents.

Appendix B

Class D: This class includes persons or entities who resided, worked, owned or leased real or personal property, conducted business, provided goods or services, or engaged in other enterprises or endeavors in the area of Philadelphia to which access was limited because of the fire and who or which suffered harm on account of the threat of physical harm or the closure of the City's streets. (¶ 40d).

Class E: This class includes persons and entities who conducted business or engaged in other enterprises or endeavors in Philadelphia who suffered harm as a result of the obstruction and closing of public ways and streets as a result of the fire which harm is different in kind from the inconvenience suffered by other members of the general public. (¶ 40e).

Defendants

1. Owner/Manager Defendants: The Complaint has designated the following defendants, collectively, as the Owner/Manager Defendants[7]:

*Richard I. Rubin & Co., Inc. ("Rubin"): It is alleged that Rubin is a corporation which managed the Building and was responsible for its safety including all fire detection, suppression and protection systems. (¶ 21).

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7. All of the Owner/Manager Defendants except Rodin and ABM have filed an collective motion to dismiss. The defendants who filed that motion refer to themselves as the "ER Defendants." ABM has moved to dismiss all claims brought against it as an Owner/Manager Defendant, contending that it is neither owner nor manager. Plaintiffs' lack of response to this aspect of ABM's motion may be viewed as concurrence, and thus ABM is not considered to be an Owner/Manager Defendant. Rodin made no such motion and thus allegations made against Owner/Manager Defendants include ER Defendants and Rodin.

Appendix B

*Equitable Life Assurance Society of the United States ("Equitable"): It is alleged that Equitable is a mutual insurance company and an owner of One Meridian. (¶ 22).

*E/R Associates: It is alleged that E/R Associates is a Pennsylvania partnership and an owner of One Meridian. (¶ 23).

*USA One Associates: It is alleged that USA One Associates is a Pennsylvania partnership of USA One BV and USA Two BV and a general partner of E/R Associates. (¶ 24).

*USA One BV: It is alleged that USA One BV is a Netherlands corporation and a general partner in USA One Associates. (¶ 25).

*USA Two BV: It is alleged that USA Two BV is a Netherlands corporation and a general partner in USA One Associates. (¶ 26).

*Algemeen Burgerlijk Pensioenfonds ("ABP"): It is alleged that ABP is a Dutch pension fund. (¶ 27). It is further alleged that USA One BV and USA Two BV are wholly owned subsidiaries of USA Holdings, BV, which is a Netherlands corporation and a wholly owned subsidiary of ABP.

*Pan American Office Investments, Inc. ("Pan American"): It is alleged that Pan American is an agent, subsidiary, and/or affiliate of the other Owner/Manager Defendants and/or managed One Meridian in conjunction with Rubin. (¶ 28).

*Rodin Investment Administration Company ("Rodin"): It is alleged that Rodin is an agent, subsidiary and/or affiliate of ABP, USA One BV, USA Two BV and/or USA One Associates. (¶ 29).

Appendix B

*Equitable Real Estate Investment Management, Inc. ("Equitable Real Estate"): It is alleged that Equitable Real Estate is a foreign corporation and an agent, subsidiary, and/or affiliate of the other Owner/Manager Defendants and/or managed One Meridian in conjunction with Rubin. (¶ 30).

*Jones Lang Wootton USA ("JLW"): It is alleged that JLW, along with Rubin, managed the Building and was responsible for its safety including its electric, sprinkler, internal hydrant and other fire protection systems. (¶ 31).

*American Building Maintenance Company ("ABM"): It is alleged that ABM employed the security guards, building engineers and other personnel who were on duty at the time of the fire.

2. Balis & Co., Inc. ("Balis"): It is alleged that Balis is a corporation which occupied the office space in One Meridian where the fire started. (¶ 33).

3. Joseph F.X. Griffin ("Griffin"): It is alleged that Griffin was a construction, cleaning and/or service company hired by Balis to finish and/or refinish certain wall panels, and that Griffin left combustible and flammable solvents in Balis' offices which started the fire. (¶ 34).

4. Penn Sprinkler Company, Inc. ("Penn Sprinkler"): It is alleged that Penn Sprinkler is a corporation which was responsible for testing the inadequate internal pump, standpipe and hydrant system in One Meridian and improperly certifying that the pressure reduction valves produced adequate water pressure when, in fact, they did not. (¶ 35).

5. Delmont Fire Protection Service, Inc. ("Delmont"): It is alleged that Delmont is a corporation which modified the Building's standpipe system in 1988 and supplied the pressure restriction valves and pumps and/or equipment, piping, fittings and materials utilized with the standpipe system which were improperly installed and/or set such that the water supply to the Building's fire fighting system was grossly inadequate. (¶ 36).

6. National Guardian Security Services Corporation ("National Guardian"): It is alleged that National Guardian is a corporation which was hired by the Owner/Manager Defendants which failed to respond to the fire alarm call and/or that they installed, maintained, and/or inspected the failed automatic dialer located in the basement of One Meridian.

B. The Fire

On Friday February 22 and/or Saturday, February 23, 1991, defendant Griffin, a company hired by defendant Balis to finish and/or refinish certain wall panels, left combustible and flammable solvents, including linseed oil, in Balis' offices on the 22nd floor. (¶¶ 34, 129). Linseed oil is highly combustible and, unless stored in a proper container, will spontaneously combust. (¶ 129). Plaintiffs allege that spontaneous combustion of the flammable liquids, and/or an electrical malfunction or other ignition sparked or reached the flammable liquids or fumes created thereby, started the fire at approximately 8:00 P.M. on Saturday evening February 23, 1991. (¶ 139).

The fire spread quickly on the 22nd floor due to the flammable solvents present on the floor. (¶ 141). Neither of the two security guards on duty called the fire department or National Guardian. (¶ 147). The report of the fire was first called in by a passer-by, at 8:23 P.M. (¶ 164, 165).

Appendix B

In the basement of the Building was an automatic dialer that was designed to automatically call the fire department or National Guardian; this dialer either failed to make the call or the relay of the call from National Guardian to the fire department was delayed. (¶¶ 148, 149). This dialer was intended to meet requirements imposed by the Philadelphia Code. (¶ 148).

Each floor of the Building is required to be a sealed membrane with no openings or gaps between floors, so that a fire cannot spread from floor to floor. (¶ 155). Furthermore, each floor has an electrical room, and the electrical room is supposed to be sealed off *from* the rest of the floor, and from the adjoining electrical rooms, so that a fire cannot breach an electrical room, but if it did, the fire could not spread from floor to floor through the electrical rooms. (¶ 157, 158). Due to a gap along the top of the north wall of the 22nd floor electrical room, and breaches in the seals between floors from the 22nd up to the 29th floor, the fire spread through the electrical fire tower[8], and the entire Building lost power. (¶¶ 153, 162, 169). The Building's emergency generator also failed, allegedly due to improper, inadequate and negligent inspection and maintenance and/or design and installation. (¶ 170). The firefighting efforts were hindered by the fact that there were no elevators and no lights. (¶ 171).

The efforts to fight the fire were hindered further by inadequate water pressure from the standpipe hydrants on the 22nd

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8. A fire tower is a sealed tower that runs from the sub-basement to the roof which is required to be sealed off from the floor space of the Building to provide egress and ingress to the fire floors without allowing the fire to breach the integrity of the fire tower. (¶ 156). In addition to the electrical fire tower, the elevator shaft was supposed to be a fire tower as were three stairwells. (¶ 68, 72).

floor. (¶ 175).[9] This was allegedly due to the negligently installed pressure reduction valves ("PRV's") and because the hoses did not fit the fire hose connectors installed and inspected by Delmont and/or Penn Sprinkler and negligently maintained by the Owner/Manager Defendants. (¶ 175, 179).

Additionally, the restriction and/or modulating valves attached to the 12th floor fire pump were negligently installed, inspected and maintained by Delmont and/or Penn Sprinkler, thus rendering the pump ineffective to place water with sufficient pressure and flow to the so-called indoor hydrants on the upper floors. (¶ 185).

Comcase Cable-Vision, a tenant of One Meridian, had installed sprinklers at its own expense on the 30th floor. (¶ 52). These sprinklers finally contained the fire. (¶ 52). There were no sprinklers at One Meridian on the 22nd floor, where the fire started, or on the seven floors above it. (¶ 53).

C. Causes of Action

Count I: Negligence Per Se

Plaintiffs allege that defendants violated state and local legislative and administrative enactments, and thus violated their statutory duty to adhere to these enactments. (¶¶ 227-231). Plaintiffs have demanded compensatory damages for uninsured property loss and economic harm, attorneys' fees and punitive damages.

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9. A "standpipe system" is designed to produce high-pressured water flow on each floor so that fires could be effectively fought from the inside of high-rise buildings. Pressure reduction valves ("PRV's") or allocation valves are utilized to regulated pressure and assure adequate water flow. (¶ 87, 90).

Appendix B

Count II: Negligence

Plaintiffs allege that defendants had a duty to plaintiffs, and that as a "direct, proximate and reasonably foreseeable result of defendants' breach of duty," plaintiffs have suffered substantial harm. (¶¶ 232-238).

Specifically, plaintiffs' allegations of negligence include the following:

1. The Owner/Manager Defendants negligently reconstructed, inspected and maintained the fire towers of One Meridian, including the electrical fire tower, and allowed numerous breaches of the fire towers. (¶ 76).

2. The seals between numerous floors, including the seals between the 22nd and 23rd floors and the other fire floors, were missing, allowing the fire to spread up the electrical fire tower. This allegedly constituted gross negligence on the part of the Owner/Manager Defendants. (¶ 79).

3. The Owner/Manager Defendants, Penn Sprinkler, Delmont and National Guardian violated various provisions of The Philadelphia Code and BOCA[10].

4. The Owner/Manager Defendants, Penn Sprinkler and Delmont:

(a) Failed to properly install, inspect, maintain, service and

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10. "BOCA" refers to the BOCA National Building Code, the Philadelphia Code adopts by reference both BOCA and the National Fire Protection Association Code ("NFPA")

test the PRV's and the standpipe system, the electrical systems, elevator and/or the fire detection, prevention and fighting systems;

(b) Failed to properly report the results of inspections and testing of the PRV's, the standpipe system, the electrical systems, elevator and/or the fire detection, prevention and fighting systems;

(c) Failed to take note of and report defective or malfunctioning aspects of the PRV's, the standpipe system, the electrical systems, elevator and/or the fire detection, prevention and fighting systems, of which these defendants were aware or should have been aware;

(d) Recommended the use of materials and equipment and operation of systems which they knew or should have known were not adequate to protect plaintiffs in the event of fire; and

(e) Failed to recommend to the Owner/Manager Defendants or to notify plaintiffs that applicable safety statutes and regulations had not been and should be strictly adhered to. (¶ 95).

5. The Owner/Manager Defendants:

(a) Failed to warn plaintiffs that the Building did not have adequate fire alarm, control or fire suppression systems;

(b) Failed to warn plaintiffs that the Building was in violation of applicable laws and regulations relating to fire safety;

(c) Allowed the Building to be improperly designed, redesigned, constructed and renovated without regard for statutory and regulatory requirements pertaining to fire safety, and without regard to the ready availability of relatively inexpensive fire control and suppression systems;

(d) Failed to maintain adequate fire control and suppression systems, including fire seals, PRV's, water supply, electrical, ventilation and elevator systems;

(e) Refused to take action to prevent further and continuing injury to plaintiffs' property after the fire;

(f) Failed to ensure that contractors hired to install, maintain and inspect the building's fire control and suppression systems did so in accordance with statutory and regulatory requirements. (¶ 118).

6. Penn Sprinkler, Delmont and/or the Owner/Manager Defendants negligently installed and calibrated the PRV's and subsequently improperly and negligently tested, inspected and maintained the PRV's and/or caused improper certification of the PRV's so that there was inadequate water pressure and flow in the Building and its standpipe system. (¶¶ 121-122). Plaintiffs allege that this constituted gross negligence. (¶ 122).

7. Griffin and Balis negligently left and maintained flammable solvents on the 22nd floor, which violated Chapters 5-1600, 5-1700 and 5-3100 of the Philadelphia Code which impose a duty to segregate, store and safekeep flammable and combustible liquids, finishes and other materials and conditions tending to create fire hazards. (¶¶ 131, 132).

8. Balis failed to properly supervise Griffin. (¶ 132).

9. The Owner/Manager Defendants improperly permitted Griffin and Balis to bring these materials into the Building and to undertake this type of activity, negligently failed to inspect properly the work area, and negligently failed to supervise

properly the workers who negligently left the flammable solvents on the 22nd floor, and failed to remove the flammable solvents and liquids. (¶ 133).

10. The Owner/Manager Defendants violated their duty pursuant to Chapter 5-3400 of the Philadelphia Fire Code to train their personnel in fire safety procedures.

11. ABM employees failed to investigate a strong odor on the 22nd floor (¶ 134-135), an ABM employee improperly used an elevator to determine if there was a fire on the 22nd floor (¶ 143) and ABM employees failed to notify the Philadelphia Fire Department that there was a fire in the Building (¶ 147).

Count III: Strict Liability – Ultrahazardous Activity

Plaintiffs allege that the Owner/Manager Defendants, Delmont, Penn Sprinkler and National Guardian were engaged in an abnormally dangerous and ultrahazardous activity and therefore owed an absolute duty to plaintiffs to conduct their operations in a safe and proper manner. This alleged activity was "installing, implementing, constructing, maintaining, operating, testing and/or inspecting the fire alarm, detection, prevention, suppression, prevention [sic] and fire safety systems and/or the electrical, elevator, water, standpipe, lighting and ventilation systems." (¶ 240). Furthermore, plaintiffs allege that "operating One Meridian with the above-described sixteen inch gap in the electrical fire tower at the 22nd Floor, the other breaches in the integrity of the electrical fire tower, the improperly calibrated and negligently installed, calibrated, maintained, tested and inspected PRV's, the other numerous violations of the Philadelphia Code and BOCA as set forth above, and the failed products equipment and systems, created an ultra-hazardous activity which could not be safe despite otherwise reasonable care." (¶ 242).

Appendix B

Count IV: Trespass

Plaintiffs allege that all defendants'[11] conduct was a substantial physical invasion and trespass in that, as a result of their conduct, smoke, airborne toxins, water, falling granite and/or other Building debris or physical barriers were discharged or placed upon the property of plaintiffs who are members of, and all other members of, proposed Classes A, B and C. (¶ 244 - 249).

Count V: Private Nuisance

It is alleged that all defendants unreasonably interfered with the use and enjoyment of the property of plaintiffs, including barring access thereto and causing damage thereto from smoke, airborne toxins, water, falling granite and/or other Building debris, and the threat of other physical damage, thereby causing a private nuisance. (¶¶ 250 - 255).

Count VI: Public Nuisance

Plaintiffs allege that defendants' conduct resulted in an unreasonable and significant interference with the right of the general public to use and traverse the public streets with safety and convenience, thereby giving rise to a public nuisance. (¶ 260). The closing and obstruction of the streets wholly and/or partly deprived plaintiffs of reasonable, safe and convenient access to their premises and/or businesses. (¶ 263). Plaintiffs also allege harm in addition to the harm suffered by the general public, in that:

(a) they have been deprived of their right of reasonable, safe

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11. The allegations is this count are against "defendants," ¶ 38 of the Complaint defines the term as all of the defendants unless otherwise indicated.

and convenient access by others to their premises and/or places of business;

(b) they have suffered losses of profits and/or revenues which they obtain through their businesses and/or offices;

(c) they have suffered loss of use and enjoyment of real and/or personal property. (¶ 266).

Count VII: Punitive Damages

Finally, plaintiffs allege that "the fire raged uncontrollably for nineteen (19) hours because of gross violations of building and fire codes and because even the most basic fire control and suppression systems which existed at the Building failed shortly after the fire ignited." (¶ 271). It is further alleged that the Owner/Manager Defendants recklessly and wantonly disregarded the safety, well-being and livelihoods of plaintiffs and others by their conduct, including allowing the gap in the 22nd floor electrical room to exist, which gap allowed the fire to penetrate into the electrical fire tower, allowing the seals between floors to be missing, thereby permitting the fire to spread up the electrical fire tower, and allowing the PRV problems, as described above, to exist, thereby providing the Building with insufficient water pressure to fight the fire. (¶¶ 275, 78, 79, 122). Thus, plaintiffs request punitive damages so that others like the Owner/Manager Defendants will not "be permitted to sacrifice the lives, well-being, livelihoods and valuable property of individuals for the sake of a few more dollars in profit especially where, as here, the huge cost in life and property could have been readily avoided through the known and easily affordable means of installing new sprinklers and/or properly maintaining the existing fire detection, control and suppression systems." (¶ 277).

Appendix B

III. Standard of Review

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Rocks v. Philadelphia,* 868 F.2d 644, 645 (3d Cir. 1989). All well-pleaded factual allegations in the complaint must be taken as true. *Cruz v. Beto,* 405 U.S. 319, 322 (1972); *Rocks,* 868 F.2d at 645. The court must draw all reasonable inferences from the allegations and view them in the light most favorable to the non-moving party. *Rocks,* 868 F.2d at 645.

IV. Discussion

A. Improper Demand for Damages

Several paragraphs of the Complaint make reference to damages in excess of the pertinent jurisdictional amount. Defendants have moved to dismiss, or, alternatively, to strike these references.[12] Local Rule 30 of the United States District Court for the Eastern District of Pennsylvania provides:

> No pleading asserting a claim for unliquidated damages shall contain any allegation as to the specific dollar amount claimed, but such pleadings shall contain allegations sufficient to establish the jurisdiction of the court, to reveal whether the case is or is not subject to arbitration under Local Rule 8, and to specify

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12. This argument has been raised by Delmont, Rodin, Penn Sprinkler, Balis and ABM.

> the nature of the damages claimed *e.g.*, "compensatory," "punitive," or both.

Defendants have also presented case law which establish that Pennsylvania courts have held that allegations of a sum certain in excess of the amount necessary to establish jurisdiction are immaterial, impertinent and inappropriate. *See, e.g., Strick Corporation v. Penn Yan Express, Inc.*, 62 F.R.D. 4, 5 (E.D. Pa 1974). Plaintiffs counter that it is the assertion of a purely arbitrary figure of damages that will be stricken. *See, e.g., Ryer v. Harrisburg Kohl Bros., Inc.*, 53 F.R.D. 404 (M.D. Pa. 1971).

The local rule is clear and unambiguous. It states that no pleading asserting a claim for unliquidated damages shall contain *any* allegation as the specific dollar amount claimed (emphasis added). Nothing is said about the reasonableness or arbitrariness of the figure. Defendants' motion to strike the specific sum in favor of a sum sufficient to establish this court's jurisdiction is granted.

B. Recovery for Purely Economic Loss

This issue is at the core of all of the motions to dismiss.[13] A large part of the damages that plaintiffs are demanding are for economic losses, including lost wages of employees and lost profits of businesses and individuals. Defendants argue that Pennsylvania law does not permit a plaintiff to recover economic damages in the absence of either personal injury or property damage (collectively, "physical harm"[14]). This is known as the economic loss doctrine.

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13. Only Penn Sprinkler did not raise this argument.

14. No plaintiff has alleged personal injury in this action. Therefore, in discussing the physical harm requirement, only the presence or absence of property damage is at issue.

Appendix B

Relying on the economic loss doctrine, defendants have asked that various parts of the Complaint be dismissed:

1. All claims for economic loss by plaintiffs who allege no property damage. Plaintiffs LegXpress, Square Corp., Sunshine, and Triumphe did not allege property damage.

2. All claims for economic loss by plaintiffs who allege property damage consisting of the "physical invasion" of smoke, odor, water, or airborne toxins, or denial of access to their property. Defendants argue that this harm does not qualify as physical harm. These plaintiffs include Vinciguerra, Corcoran, Chris' Cafe and The Happy Rooster.

3. All claims for economic harm by all plaintiffs. In order for economic loss to be compensable, defendants argue, the economic loss must flow directly from the property damage, and no plaintiff alleged a causal relationship between the property damage pleaded and the economic harm claimed.

Plaintiffs have responded with several arguments:

1. Plaintiffs have alleged causes of action which do not require physical harm to recover economic damages, namely, strict liability for the operation of an abnormally dangerous activity, malicious, wanton and intentional conduct, private nuisance, public nuisance and trespass;

2. Plaintiffs state a negligence claim for the recovery of their economic losses even in the absence of physical harm;

3. Plaintiffs who alleged physical invasion by water, smoke, airborne toxins, odor and denial of access to their property have pled sufficient physical harm to recover in negligence; and

4. Plaintiffs have alleged adequate property damage, and the relationship between the property damage and economic loss is not at issue.

Within this section of this opinion, other issues raised in the various motions to dismiss will be resolved as a consequence, namely, the legal viability of the Complaint's counts for strict liability for an abnormally dangerous activity, public and private nuisance, and trespass.

1. The Economic Loss Doctrine, Generally

The Supreme Court of the United States first suggested the common law rule that no cause of action should exist for negligence that causes economic loss but no property damage in *Robins Dry Dock and Repair Co. v. Flint*, 275 U.S. 303 (1927). The Supreme Court revisited the economic loss doctrine in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), and concluded that the dismissal of claims for economic loss of parties who had suffered only economic loss was a sensible restriction to the potential liability occasioned by a single event, in that case, a defective product which caused supertankers to malfunction while at sea. The Court, after analyzing a series of potential plaintiffs, all of whom were arguably foreseeable, disapproved of the potential for such widespread liability, stating that "[t]he law does not spread its protection so far." (*Id., citing Robins Dry Dock*, 275 U.S. at 309).

The doctrine is meant to protect a tortfeasor from tremendous liability for a single act. This is concisely explained by the court in *Stevenson v. East Ohio Gas Co.*, 47 Ohio App. 586, 73 N.E.2d 200 (1946):

Appendix B

> If one who by his negligence is legally responsible for an explosion or a conflagration should be required to respond in damages not only to those who have sustained personal injuries or physical property damage but also to every one who has suffered an economic loss, by reason of the explosion or conflagration, we might well be appalled by the results that would follow.

The general rule is stated in the *Restatement* (Second) of Torts § 766C:

> Negligent Interference With Contract or Prospective Contractual Relation
>
> One is not liable to another for pecuniary harm not deriving from physical harm to the other, if that harm results from the actor's negligently
>
> (a) causing a third person not to perform a contract with the other, or
>
> (b) interfering with the other's performance of his contract or making the performance more expensive or burdensome, or
>
> (c) interfering with the other's acquiring a contractual relation with a third person.

Furthermore, the doctrine provides a "bright line rule" which allows courts to easily determine who may recover for economic loss in lieu of making difficult foreseeability determinations.

Appendix B

The Supreme Court cases both involved federal admiralty law, and thus are merely persuasive to Pennsylvania courts. Nonetheless, these cases have been cited with approval in Pennsylvania, and it is clear that Pennsylvania utilizes the economic loss doctrine to limit liability in tort cases. The seminal case is *Aikens v. Baltimore and O. R. Co.*, 348 Pa. Super. 17, 501 A.2d 277 (1985). *Aikens* involved the claims of employees of a plant damaged by a train derailment against the railroad for lost wages. These employees had suffered no property damage or personal injury. The Superior Court held that "no cause of action exists for negligence that causes only economic loss," and affirmed the grant of judgment on the pleadings for the defendant railroad. *Id.* at 279. The court also expressly adopted § 766C of the *Restatement. Id.* Furthermore, the *Aikens* court specifically declined to adopt the rule of law in *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60 (1979). The *J'Aire* court held that "recovery for injury to one's economic interests, where it is the foreseeable result of another's want of ordinary care, should not be foreclosed simply because it is the only injury that occurs." *Id.* at 411-412.[15]

In *Moore v. Pavex, Inc.*, 356 Pa. Super. 50, 514 A.2d 137 (1986), a construction worker using a jackhammer ruptured a city water main. Plaintiffs, individuals and corporations doing business in the city, sought damages for losses they sustained as a result of the interruption of water service. The Superior Court upheld the lower court's ruling that "there could be no recovery for economic loss by the plaintiffs in this case who did not suffer *physical harm*

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15. The more recent case of *Peoples Express Airlines, Inc. v. Consolidated Real Corp.* 100 N.J. 246, 495 A.2d 107 (1985) also permitted recovery of purely economic loss. While not expressly rejected by Pennsylvania courts, the case was decided before *Aikens* and its progeny and was ignored.

to property in which they had a proprietary interest." *Id.* at 138 (emphasis in original).

In *General Public Utilities v. Glass Kitchens of Lancaster, Inc.*, 374 Pa. Super. 203, 542 A.2d 567 (1988), corporations associated with the Pennsylvania Dutch tourist industry sought damages for economic loss due to the diminution of the number of visitors to Lancaster County caused by the Three Mile Island "nuclear incident." The Superior Court expressly declined the opportunity to modify the economic loss doctrine as it was enunciated in *Aikens*. In so doing, the court stated:

> The concerns we recognized in *Aikens* apply with equal weight to [plaintiffs'] claims even though their claims arise from a nuclear generating facility accident. Our decision in *Moore v. Pavex, Inc.*, 356 Pa. Super. 50, 514 A.2d 137 (1986), does not dictate a different result. . . Importantly, then *Moore* reaffirmed the general rule of law that economic losses may not be recovered in tort absent any physical injury or property damage.
>
> *Id.* at 570.

Defendants argue that the rule of law illustrated by the above cases warrants dismissal of the claims for economic loss of all plaintiffs. Plaintiffs respond that under several theories of liability, including negligence, defendants can be held liable for economic loss even without allegations of property damage.

Appendix B

2. Strict Liability — Abnormally Dangerous Activity

Plaintiffs allege that the Owner/Manager Defendants, Delmont, Penn Sprinkler and National Guardian engaged in an abnormally dangerous activity, thereby subjecting themselves to strict liability for any harm which results from that activity. Plaintiffs' argument is twofold. First, they argue, essentially, that operating a building, which includes maintaining fire prevention, detection and suppression systems, is an abnormally dangerous activity. Second, they argue that operating One Meridian as defendants did, with the gap in the electrical fire tower at the 22nd floor, the breaches in the integrity of the electrical fire tower, the improper maintenance of the PRV's and violations of the Philadelphia Code, was an abnormally dangerous activity.

Pennsylvania has adopted § 519 of the *Restatement* (Second) of Torts, which imposes strict liability on one who carries on an abnormally dangerous activity, and § 520, which discusses the factors which determine whether an activity is abnormally dangerous for strict liability purposes. *See Federoff v. Harrison Const. Co.*, 362 Pa. 181, 66 A.2d 817 (1949); *Villari v. Terminix Int'l. Inc.*, 663 F. Supp. 727 (E.D. Pa. 1987).

This argument raises two issues:

1. Whether defendants' "activities" as characterized by plaintiffs are, in a legal sense, abnormally dangerous; and

2. If either activity is abnormally dangerous, whether the "harm" for which defendants are strictly liable includes economic harm.

Appendix B

§§ 519 and 520 of the *Restatement* read as follows:

§ 519. *General Principle*

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

(2) The strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

§ 520. *Abnormally Dangerous Activities*

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

There simply is no support in Pennsylvania law for plaintiffs' contentions. An activity is abnormally dangerous when it presents a high risk of harm even when performed with due care or even extraordinary care. In the first instance, the operation of the Building and its requisite safety systems is clearly an activity which, although requiring reasonable and perhaps extraordinary care, is not inherently an abnormally dangerous activity and does not present a high risk of harm when performed with due care. This is demonstrated by *Matulevich v. Matulevich*, 345 Pa. Super. 507, 498 A.2d 939 (1985), where the Superior Court addressed the question of whether the handling of firearms (high powered rifles) is an abnormally dangerous activity. The court concluded that it was not, stating that while it was an activity that required "extraordinary care, the want of which imposes liability based on negligence," it was not an activity that imposed liability without a showing of negligence. *Id.* at 941. In deciding whether an activity is abnormally dangerous, the key determination for the court is:

> [W]hether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care. In other words, are its dangers and inappropriateness for the locality so great that, despite any usefulness it may

> have for the community, it should be required as a matter of law to pay for any harm it causes, without the need of a finding of negligence.

Albig v. Municipal Authority of Westmoreland County, 348 Pa. Super. 505, 502 A.2d 658, 689 (1985) (quoting *Restatement*, § 520 Comment (f)). This discussion clearly contemplates an activity which has some societal usefulness, but carries with it inherent, unavoidable hazards. In this case, as plaintiffs themselves suggest, the risks could have been avoided by the exercise of reasonable care. Accordingly, strict liability is inappropriate for the "activity" of operating a building.

Taking it one step further, plaintiffs also contend that the manner in which defendants operated the Building made it an abnormally dangerous activity. This, however, is just a reiteration of plaintiffs' claims that defendants operated the Building negligently. Doing anything in an unreasonable and unsafe manner, as plaintiffs have alleged defendants have done with the maintenance and operation of the Building, will result in an abnormally dangerous situation, as the term is used in a non-legal sense. However, plaintiffs' wordplay does not bring this case within the scope of the principle of strict liability. Plaintiffs' allegations rest on the notion that defendants failed to exercise care. This is clearly a negligence concept. A strict liability claim can be stated only if the activity itself, and not the manner in which the activity is performed, is abnormally dangerous.

Pennsylvania cases which have imposed strict liability for abnormally dangerous activities are clearly distinguishable. In *Bumbarger v. Walker*, 193 Pa. Super. 301, 164 A.2d 144 (1960) the court imposed strict liability for blasting, and in *Lutz v. Chromatex, Inc.*, 718 F.Supp. 413 (M.D. Pa. 1989) the court found that the

storage of hazardous waste could be the basis of a strict liability claim. These activities serve a legitimate purpose but carry with them risks which cannot be averted even with reasonable care.

This case is also distinguishable from the few cases plaintiffs have offered in support of their argument. In *Lubin v. Iowa City,* 257 Iowa 383, 131 N.W. 2d 765 (1964), the court considered the operation and maintenance of an underground water main to be an abnormally dangerous activity because the city chose to utilize the practice of burying cast iron pipe six feet underground. In using that method, there was no reasonable way to inspect the pipe; the city had to wait for breaks to occur in the pipes to call attention to problems. The court found that since the city chose to use this method to cut down maintenance costs, they also had to pay "the cost of doing business in this manner." *Id.* at 392, 131 N.W.2d at 771.

In addition to *Lubin,* plaintiffs cite *Sun Pipe Line Co. v. Tri-State Telecommunications, Inc.*, 45 Pa. D. & C. 3d 135 (1986)[16] in their memorandum. However, this case was reversed *sub nom, Melso v. Sun Pipe Line Co.*, 394 Pa. Super. 578, 576 A.2d 999 (1990), *app. den.*, 527 Pa. 667, 593 A.2d 842 and *app. den., Sun Pipe Line Co. v. E.A. Designs, Ltd.*, 527 Pa. 667, 593 A.2d 843 (1991); the court held that the operation and maintenance of a petroleum pipeline under a housing development is not an abnormally dangerous activity. The lower court had held that this activity was abnormally dangerous; the reversal of this holding refutes in the most convincing possible way that plaintiffs' reliance on it is misplaced. The *Sun Pipe Line Co.* case is similar to the *Lubin* case and thus rejects the *Lubin* court's reasoning.

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16. This case has taken on various names in its progression through the courts, the District and County Reporter reports the name as *Cipriani v. Sun Pipe Line Co.*

Furthermore, the *Lubin* case is distinguishable in that broken pipes were an inevitable and accepted part of the method of maintaining the water main as Iowa City did; it is fair that Iowa City bear the costs. In this case, a fire and its rampant spread was certainly not inevitable or accepted; if defendants are to be liable, some fault must be proven.

Furthermore, even if either "activity" is an abnormally dangerous one for strict liability purposes, this does not allow plaintiffs to avoid the economic loss doctrine. Plaintiffs have attempted to make a distinction between the definitions of "harm" and "physical harm" in the *Restatement.* Section 7 of the *Restatement* defines the two terms:

> § 7. Injury and Harm.
>
> (2) The word "harm" is used throughout the Restatement [of Torts] to denote the existence of loss or detriment in fact of any kind to a person resulting from any cause.
>
> (3) The words "physical harm" are used throughout the Restatement [of Torts] to denote the physical impairment of the human body, or of land and chattels.

Plaintiffs contend that since § 519 uses the word "harm" instead of the phrase "physical harm," economic losses must be included within the allowable recovery for strict liability ("One who carries on an abnormally dangerous activity is subject to liability for *harm* to the person, land or chattels of another resulting from the activity . . ."). However, the court in *In Re TMI Litigation Governmental Entities Claims,* 544 F.Supp. 853 (M.D. Pa. 1982),

vacated on other grounds, Pennsylvania v. General Public Utilities Corp., 710 F.2d 117 (3d Cir. 1983) considered this very issue and held that § 519 of the *Restatement* requires physical harm or property damage to recover in strict liability. Judge Rambo specifically considered the scope of the term "harm" as used in § 519:

> The statement of the law itself would seem to answer plaintiff's contention. Harm to "person, land or chattels" is a necessary element of the cause of action. Any additional damages, such as economic loss . . . would have to flow from or be attendant upon the existence of one of the three enumerated harms.

Id. at 858. Furthermore, it is not the possibility of economic harm which makes an activity such as blasting or storing hazardous waste dangerous; it is the possibility of physical harm. Thus, even if plaintiffs did state a claim for carrying on an abnormally dangerous activity, economic losses would still not be recoverable.

Accordingly, I find that plaintiffs cannot circumvent the economic loss doctrine by its allegations of strict liability based on an abnormally dangerous activity. Count III of the Complaint is dismissed altogether.

3. Allegations of Malicious, Wanton and Intentional Conduct

Plaintiffs argue that "[t]he law imposes a different scope of liability on defendants who intentionally engage in misconduct and does not require a showing of physical harm as a prerequisite to recovery." Plaintiffs' Memorandum at 40. Plaintiffs cite §§ 766,

766A and § 766B of the *Restatement* in support of this argument. These sections state, essentially, that intentional interference with the performance of a contract by a third person (§ 766), intentional interference with another's performance of his own contract (§ 766A), and intentional interference with prospective contractual relations (§ 766B) may subject the person who interferes with the contractual relations to liability for the resulting pecuniary loss.[17]

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17. *Restatement* §§ 766, 766A and 766B provide as follows:

§ 766. Intentional interference with Performance of Contract by Third Person

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

§ 766A. Intentional Interference with Anothers Performance of His Own Contract

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

§ 766B. Intentional Interference with Prospective Contractual Relation

(Cont'd)

Appendix B

In order to state a prima facie case for interference with prospective contractual relations, a plaintiff must show a prospective contractual relationship, the purpose or intent to harm by preventing the relationship from occurring, the absence of privilege or justification and actual harm or damage as a result of the conduct. *Gordon v. Lancaster Osteopathic Hosp. Asso.*, 340 Pa. Super. 253, 489 A.2d 1364, 1370 (1985), *citing Glenn v. Point Park College*, 441 Pa. 474, 272 A.2d 895 (1971), quoting *Restatement* § 766. It is clear from these cases (both of which were cited by plaintiffs) that the "intentional" conduct required to state a claim for this cause of action is intentional interference with the contractual relationship, that is, the defendant must have an objective of interference. In *Gordon*, the court held that plaintiff did state a claim for intentional interference with prospective contractual relations; the defendant doctors had written letters to the executive board of the defendant hospital expressing a lack of confidence in the plaintiff doctor's abilities and their desire to replace him. By contrast, in *Glenn*, the defendant negotiated to buy a property directly from its owner after having learned the much of the necessary information from a real estate broker. The real estate broker, having been bypassed and thus denied a commission, sued

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(Cont'd)

> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) as subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of
>
> (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
>
> (b) preventing the other from acquiring or continuing the prospective relation.

for intentional interference with prospective contractual relations. The broker lost, in part because they failed to allege defendant's specific intent to harm the broker. *Id.* at 899. The court stated:

> It must be emphasized that the tort we are considering is an intentional one: the actor is acting as he does *for the purpose of causing harm* to the plaintiff . . . The lower court stated in its opinion that 'There is no allegation that the defendant acted for specific purpose of causing harm to the plaintiffs.' We agree . . . It thus does not meet the test of . . . the Restatement.

Id. (emphasis in original).

As in the above cases, there is no allegation that the defendants acted with the intent to interfere with any contractual relations or the purpose of causing harm to the plaintiff. Plaintiffs have alleged that defendants, particularly the Owner/Manager Defendants, were willing to tolerate fire hazards in order to avoid the expense of upgrading the fire safety equipment, and that these defendants knew or should have known that a devastating fire was likely to occur. Despite plaintiffs' conclusory allegations that defendants' conduct was thus "intentional," this is not the same intent that is necessary to make out a prima facie case of intentional interference with contractual relations.

Additionally, it is interesting to note that the next section of the *Restatement,* sequentially, beyond the three sections plaintiffs cited in support of this argument, is § 766C, which, as stated above, expresses the general rule of the economic loss doctrine. The difference between §§ 766, 766A, 766B and 766C is the state of

mind required to attach liability. Plaintiffs have not alleged the requisite state of mind to invoke §§ 766, 766A or 766B.

Accordingly, I find that plaintiffs cannot use this cause of action to circumvent the economic loss doctrine. Since plaintiffs did not assert this as a separate count, however, there is nothing to dismiss.

4. Private Nuisance

Plaintiffs assert that a private nuisance legal theory does not require physical harm to recover economic damages. Once again, plaintiffs rely on the *Restatement.* Section 822 states the elements of liability for private nuisance[18]:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
>
> (a) intentional and unreasonable, or
>
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Plaintiffs offer the case of *Puritan Holding Co. v. Holloschitz,* 82 Misc. 2d 905, 372 N.Y.S.2d 500, 501 (1975) in support of their

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18. Pennsylvania has adopted this section. *See McQuilten v. A & R Dev. Corp.* 576 F.Supp. 1023, 1029 (E.D. Pa. 1983).

argument that purely economic recovery is allowed despite the absence of physical injury in a cause of action for private nuisance ("Every person who suffered actual damages, whether direct or consequential, from a nuisance, might maintain an action for his own particular injury."). There is direct Pennsylvania authority to the contrary, however. *See, e.g. Moore v. Pavex, Inc.* 356 Pa. Super. 50, 514 A.2d 137 (1986); *General Public Utilities v. Glass Kitchens of Lancast . Inc.*, 374 Pa. Super. 203, 542 A.2d 567 (1988). In *Moore*, the Superior Court rejected plaintiff's claims that "the law of private nuisance supports their recovery for economic harm." *Moore*, 514 A.2d at 138. The court stated, generally, that "expectancies of liability cannot flow beyond the persons or property injured, for economic losses only, without creating interminable chains of remote consequences and imponderable issues of liability and damages." *Id.* at 140. In *Glass Kitchens*, the court even more emphatically stated that "the general rule of law [is] that economic losses may not be recovered in *tort* absent any physical injury or property damage." 542 A.2d at 570 (emphasis added).

Most importantly, the arguments underlying Pennsylvania's adoption of the economic loss doctrine would be severely undermined if plaintiffs could circumvent the doctrine with creative pleading, such as the use of a private nuisance theory in lieu of negligence. The *Aikens* court discussed those underlying arguments:

> [A]llowance of a cause of action for negligent interference with economic advantage would create an undue burden upon industrial freedom of action, and would create a disproportion between the large amount of damages that might be recovered and the extent of the defendant's fault. *See* Restatement

> (Second) of Torts Sec. 766C, comment a (1979). To allow a cause of action for negligent cause of purely economic loss would be to open the door to every person in the economic chain of the negligent person or business to bring a cause of action. Such an outstanding burden is clearly inappropriate and a danger to our economic system.

Aikens, 501 A.2d at 279. The logic of this rule does not change merely because the underlying tort is private nuisance instead of negligence.

Defendants also contend, correctly, that to recover for private nuisance the nuisance must be intentional or be "otherwise actionable" under theories of negligence, strict liability or reckless conduct. As discussed above, defendants' conduct was not intentional, and economic losses are not recoverable under negligence, strict liability or reckless conduct theories. Thus, on this threshold level, plaintiffs do not state a claim for recovery of economic losses under a private nuisance theory.

Additionally, defendants have raised the argument that plaintiffs do not allege a sufficient property interest to state a cause of action for private nuisance. Specifically, Dembowski, Grandy, Crumlish, Allen, Atlee and Triumphe do not allege any interest in real property. Plaintiffs argue that this ignores "The expansive view which both the *Restatement* and the courts of Pennsylvania apply to the property interest requirement of private nuisance." Plaintiff's Memorandum at 68.

Section 821E of the of the *Restatement*, entitled "Who Can Recover for Private Nuisance," states:

Appendix B

> For a private nuisance there is liability only to those who have property rights and privileges in respect to the use and enjoyment of the land affected, including
>
> (a) possessors of the land,
>
> (b) owners of easements and profits in the land, and
>
> (c) owners of nonpossessory estates in the land that are detrimentally affected by interferences with its use and enjoyment.

Possessors of land are defined in Restatement § 328E[19], which reads:

> § 328E. Possessor of Land Defined.
>
> A possessor of land is
>
> (a) a person who is in occupation of the land with intent to control it, or
>
> (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
>
> (c) a person who is entitled to immediate

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19. This section has been adopted by Pennsylvania courts. *See Lechter v. Eastern Realty Co.*, 358 Pa. Super. 189, 192, 516 A.2d 1247, 1249 (1986).

> occupation of the land, if no other person is in possession under Clauses (a) and (b).

The official comments to Restatement § 821E indicate that an individual with any possessory estate can recover in private nuisance (Comment (c)), that occupancy is a sufficient interest (Comment (d)), and that owners of an easement have a sufficient interest as well (Comment (e)).

Based on this analysis, plaintiffs assert that all plaintiffs who were landlords, tenants, sole proprietors, service contractors and even employees in the affected area had a sufficient degree of control over their work area to justify a claim in nuisance. *See* Plaintiff's Memorandum at 71 (analogizing employees to family members of possessors of land who qualify to bring a claim for nuisance as "occupants," as discussed in Comment (d) to Restatement § 821E).

There is nothing to indicate that Pennsylvania has adopted these sections of the *Restatement.* Furthermore, I do not believe that Pennsylvania courts would take such a broad view of "possessor of land." Accordingly, I hold that the only plaintiffs who have a sufficient interest in property to bring a private nuisance claim are Ejay, Regent Shoes, LegXpress, Square Corp., Vinciguerra, Corcoran, Sunshine, Royal Bank, Chris' Cafe and the Happy Rooster, as they all leased space which was allegedly the subject of the private nuisance. Nonetheless, these plaintiffs cannot recover for economic loss resulting from the nuisance. No other plaintiff has a sufficient interest in property and therefore none can bring a private nuisance claim at all.

Appendix B

4. Public Nuisance

Plaintiffs argue that the economic loss doctrine is a negligence concept which does not apply to claims of public nuisance. Section 821B of the *Restatement* defines public nuisance as follows:

> (1) A public nuisance is an unreasonable interference with a right common to the general public.
>
> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> > (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
> >
> > (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
> >
> > (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

It is clear that the economic loss doctrine is not applicable to public nuisance claims, but defendants contend that plaintiffs'

public nuisance claim must be dismissed entirely because plaintiffs did not sustain any special or peculiar harm as a result of the nuisance. Section 821C of the *Restatement* states, in pertinent part:

> In order to recover for damages in an individual action for public nuisance, one must have suffered a harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.

The Complaint alleges that "the right to use and safely traverse the public streets surrounding [One Meridian Plaza] is a right common to the general public," (¶ 257), and that this right was interfered with by defendants. The special or peculiar harm suffered by plaintiffs is described as "being deprived, and having their customers deprived, of safe, convenient and reasonable access to their business premises, and suffering pecuniary harm as a result of this deprivation." Plaintiffs' Memorandum at 71-72. This is allegedly different from the harm suffered by other members of the public because "[W]hile other members of the public were inconvenienced . . . they were not denied reasonable and safe access to their business premises, nor did they lose significant business because customers, upon whom their businesses depend, were deprived of convenient access to their business premises." Plaintiffs' Memorandum at 75.

Essentially, plaintiffs have two underlying bases for their assertion that they have suffered special harm: denial of access to land and pecuniary loss. In support of these two arguments, plaintiffs cite the following official comments to Restatement § 821C:

Appendix B

f. *Access to land.* The right of access to land, that is, the right of reasonable and convenient ingress and egress, is itself a property right in the land. If the public nuisance interferes with immediate ingress and egress to the plaintiff's land, the nuisance is a private as well as a public one and the harm suffered by plaintiff is particular harm differing in kind from that suffered by the general public, so that the plaintiff can recover for the public nuisance. . . .

h. *Pecuniary Loss.* Pecuniary loss to the plaintiff resulting from the public nuisance is normally a different kind of harm from that suffered by the general public. A contractor who loses the benefits of a particular contract or is put to an additional expense in performing it because of the obstruction of a public highway preventing him from transporting the materials to the place of performance, can recover for public nuisance. The same is true when it can be shown with reasonable certainty that an established business has lost profits, as when the obstruction of the highway prevents a common carrier from operating buses over it or access to the plaintiff's place of business is made so inconvenient that customers do not come to it. If, however, the pecuniary loss is common to an entire community and the plaintiff suffers it only in a greater degree than others, it is not a different kind of harm and the plaintiff cannot recover for the invasion of the public right.

Appendix B

Plaintiffs also cite cases from various jurisdictions in support of their arguments. (Pennsylvania courts have never explicitly considered the issue.) In *The Stop & Shop Companies, Inc. v. Fisher,* 387 Mass. 889, 444 N.E. 368, 373 (1983), defendants negligently struck a bridge with their barge, resulting in the closing of the bridge for two months. Plaintiffs operated two stores at the end of the bridge, and as a result of the bridge closing, the stores suffered a substantial decline in business. The court held that the obstruction of a public way (the bridge) constituted a public nuisance, and that the harm plaintiff suffered was different in kind from that of the public, stating that "an established business may state a claim in nuisance for severe economic harm resulting from loss of access to its premises by its customers." *Id.* However, the court stated that "if a whole community suffers [severe pecuniary] loss, then it becomes a public wrong and the plaintiff cannot recover ... Thus the question becomes whether so many businesses have suffered the same economic harm that the plaintiff's damages are no longer special." *Id.* at 373. The court continued that "[r]elief is warranted only where the plaintiff has suffered special pecuniary harm and substantial impairment of access." *Id.* at 374.

In opposition to this argument, defendants cite *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.,* 345 N.W.2d 124 (Iowa 1984). In this case also, plaintiffs brought an action sounding in negligence and public nuisance for economic losses due to the closing of a bridge allegedly caused by defendants' negligence. The action was brought by plaintiffs as a class action on behalf of themselves and all other persons connected with restaurants, bars, motels and of the business establishments sustaining damages in the form of lost profits. The Iowa Supreme Court dismissed the plaintiffs' negligence claims, citing *Robins Dry Dock* and the economic loss doctrine. Regarding the public

nuisance claim, the Court held that "the fact that plaintiffs assert this claim on behalf of the entire retail business communities of South Sioux City, Nebraska and Sioux City, Iowa implies that whatever damages have been suffered by plaintiffs have also been suffered by the entire business community and, therefore, such damages are *public* in nature rather than *special.*" *Id.* at 130 (emphasis in original).

It is clear that the special harm requirement is intended to serve the same purpose as the economic loss doctrine: to limit liability arising from an event. Public nuisances, by definition, affect many people. If every person or entity injured from a public nuisance could recover economic or even property damages, liability could be exorbitant; thus, only those plaintiffs who suffer special harm may recover. Defendants argue that because of that underlying policy, where there are numerous plaintiffs alleging the same harm, parties would be exposed to the same exorbitant liability if all of them could recover for economic harm, thus, no one plaintiff can establish special harm. They distinguish the cases plaintiffs have offered by submitting that none of them involved as many plaintiffs as the instant case.

I believe that the above cited cases and the *Restatement* are all in agreement: where there are a large number of plaintiffs, the harm those plaintiffs suffered is not special. Here, the number of established businesses which can show with reasonable certainty that they lost profits due to the closure of the streets is undetermined, although the Complaint implies that the number may indeed be large. ("The number of the members of each class is so numerous that joinder of all members is impracticable." (¶ 42)). Furthermore, while plaintiffs have alleged a lack of access, they have not alleged a "substantial" lack of access, a requirement which I think is sound. A mere inconvenience could constitute a

lack of access, but should not suffice to state a claim for public nuisance. The Complaint does not make clear exactly how long streets were closed, and how the closure specifically affected each plaintiff. I will grant those plaintiffs who may state a public nuisance claim leave to amend the Complaint in order to provide facts to establish that any lack of access was substantial.

As a matter of law I find that the only parties who may have suffered peculiar harm as a result of the closure of the streets due to the fire were those businesses who can show with reasonable certainty that they lost profits due to the closure of the streets and who suffered a substantial lack of access. The plaintiffs who may continue to assert this cause of action are Ejay, Regent Shoes, LegXpress, Square Corp., Vinciguerra, Corcoran, Sunshine, Royal Bank, Chris' Cafe and the Happy Rooster. These plaintiffs may amend the public nuisance count within twenty days to conform to this opinion. All other plaintiffs were not uniquely affected by the closure of the streets, and inclusion of these parties would increase the number of plaintiffs so as to generalize the harm. Therefore, all other plaintiffs' claims for public nuisance are dismissed. It will be determined at a later stage of the proceeding whether the number of plaintiffs is too large to permit recovery, and which plaintiffs suffered severe economic harm and a substantial lack of access.

5. Trespass

Plaintiffs argue that the economic loss doctrine is not applicable to trespass. Defendants argue that trespass is an intentional tort and since the Complaint alleges only negligent conduct, the trespass count must be dismissed. Plaintiffs counter that they do allege intentional conduct, and, alternatively, that trespass may be established by a negligent or reckless invasion of land. The trespass claim here is that, as a result of defendants'

conduct, a "substantial physical invasion" resulted and "substantial smoke, airborne toxins, water and falling granite" or other debris and barriers were placed on the property of certain plaintiffs.

Under Pennsylvania law, trespass to land is an intentional tort, and there must be an "intention to enter upon the particular piece of land in question." *Valley Forge Gardens, Inc. v. James D. Morrissey, Inc.*, 385 Pa. 477, 483, 123 A.2d 888, 891 (1956), quoting *Restatement* § 163, comment b. The key inquiry here is the definition of intent. Defendants argue that in order to state a claim for trespass, a defendant must intend the intrusion, although the defendant need not intend the harmful consequences. W. Keeton, et al., *Prosser and Keeton On The Law of Torts*, § 13 at 73 (5th ed. 1984). Plaintiffs assert that it is sufficient if defendants knew their conduct was substantially certain to result in such an invasion. *See Buckley Motors, Inc. v. Amp, Inc.*, 23 Pa. D. & C. 2d 324, 328 (1960) (citing to *Restatement* § 163, comment c). Furthermore, plaintiffs assert that they can recover under either of two other *Restatement* sections: § 165, Liability for Intrusions Resulting From Reckless or Negligent Conduct and Abnormally Dangerous Activities, whereby one who recklessly or negligently causes a thing to enter onto the land of another is subject to liability if the thing causes harm to the land or the possessor; and § 931, Detention or Preventing Use of Land or Chattels, which states that "[i]f one is entitled to a judgment for the detention of, or for preventing the use of land or chattels, the damages include compensation for . . . the value of the use during the period of detention or prevention or the value of the use or the amount paid for a substitute. . . ."

Furthermore, plaintiffs argue that even if intentional conduct is required, they have adequately alleged intentional conduct. They

claim that defendants acted "intentionally" in failing to properly maintain and operate the Building's fire suppression and protection systems. Plaintiffs also argue that if intent means that defendants know the invasion is "substantially certain" to result, that defendants "knew or should have known that such failure would result in grave and extensive harm to plaintiffs' property" (essentially, that defendants knew their conduct was substantially certain to produce such a result). I do not believe that the underlying facts of the Complaint support plaintiffs' conclusory statements regarding intent. The Complaint suggests that defendants chose to assume the risks of fire in order to save money by not properly maintaining and operating the Building's fire suppression and protection systems. This is a far cry from being "substantially certain" that a devastating fire would occur.

I also find that reckless and/or negligent conduct is not sufficient to state a cause of action for trespass. The only Pennsylvania decision incorporating either of the two *Restatement* sections upon which plaintiffs rely is *Glass v. Dean Coal Co.*, 7 Pa. D. & C. 2d 657, 659 (1956) (citing to *Restatement* § 931). *See also Apartment Owners and Managers Committee v. Brown*, 252 Pa. Super. 539, 382 A.2d 473, 480 (dissenting opinion) (citing to *Restatement* § 931 for the measure of damages for tortious detention of a chattel). Furthermore, § 931 is merely a measure of damages; the underlying tort is "tortious conduct [which] has prevented the owner from using the land, as when the defendant by acts on his own land has made the use of the plaintiff's land dangerous or unhealthful." *Restatement* § 931, comment a. There is not sufficient indication that Pennsylvania courts, if confronted with the question today, would allow plaintiffs to state a cause of action based on either of these sections.

Furthermore, defendants argue that even if a trespass claim

could be based upon negligence, pure economic losses would still not be available in this case. A trespasser is liable not only for personal injuries resulting directly and proximately from the trespass but also for those which are indirect and consequential. *Kopka v. Bell Tel. Co.*, 371 Pa. 444, 451, 91 A.2d 232 (1952); *See also Northeast Women's Center, Inc. v. McMonagle*, 689 F. Supp. 465, 477 (E.D. Pa. 1988), *aff'd*, 868 F.2d 1342 (3d Cir. 1989). Applying this measure of damages, plaintiffs in this case are not entitled to recover for economic losses unless there is a causal nexus between the trespass and the economic loss. That there is no such connection alleged is discussed *infra* in section 7 of this opinion on the relationship between physical damage and economic harm. If this cause of action were otherwise viable, plaintiffs would be given an opportunity to amend the Complaint and meet this requirement. Due to the ultimate disposition of this count, however, the measure of damages is immaterial.

Accordingly, plaintiffs' Count VI for trespass is dismissed with prejudice.

6. Negligence Claims Without Allegations of Physical Harm

Plaintiffs argue that they state a negligence claim for the recovery of their economic losses even in the absence of physical harm. Their efforts to exclude the case at bar from the economic loss doctrine are based on two arguments. First, plaintiffs attempt to distinguish the principal Pennsylvania cases regarding the economic loss doctrine, namely *Aikens v. Baltimore and Ohio R. Co.* and *Moore v. Pavex*, by asserting that those cases did not involve economic losses suffered as a direct and immediate result of a governmental evacuation, or where there is a threat of physical harm. Second, plaintiffs argue that the two Supreme Court cases (*Robins Dry Dock* and *East River Steamship*) are inapplicable to

the instant case because those decisions rested upon contractual privity.

The *Moore* case, discussed above in the section of this opinion on the economic loss doctrine generally, involved the rupture of a water main by a construction worker using a jackhammer. The Superior Court rejected plaintiffs' claims for economic losses, citing the lack of physical harm. However, the opinion contains language which could be read to imply that if economic losses were foreseeable, such as those arising from a nuclear fallout, or if they were suffered because of the threat of physical harm, they would be recoverable despite the absence of physical damage:

> The injury [from a nuclear fallout], while not always immediately ascertainable, is direct and predictable, and for persons not to move immediately from a fallout zone to avoid possible incredible consequences, is folly and unsupportable [sic]. Any economic loss resulting from such a scenario is directly attributable to the meltdown . . . This is no mere rupture of a waterpipe. It is clearly distinguishable.
>
> *Moore*, 514 A.2d at 140.

Plaintiffs interpret this language as permitting recovery for economic losses where the losses suffered are direct and predictable, and where the loss was accompanied by serious risks of health and safety, such as here. Plaintiffs' Memorandum at 53-54. Plaintiffs also point out that neither *Moore* nor *Aikens* involved such a situation, so the cases are not inconsistent with their argument and are distinguishable from the instant case.

Appendix B

The Superior Court retreated from its position in *Moore*, or at least explained it, in *Glass Kitchens*, 542 A.2d 567. While this case did not involve a "meltdown," it did involve a nuclear accident. The court did "not decide whether a different rule of tort law will ever be applied in the context of a nuclear incident," but it did apply "traditional rules of [our] tort law" to the parties in the case. *Id.* at 571 n. 7. More importantly, it explained the above language in *Moore* not as suggesting the possibility of recovery for economic loss without physical harm but instead that

> [T]his language from *Moore* is consistent with the rule of law we announced in *Aikens*. These statements recognize that persons or property who have come in contact with radiation or fallout will suffer a direct and predictable actual injury, despite the fact that this injury may not be visible to the naked eye.
>
> *Id.* at 571 (emphasis added).

Based on this analysis, I find that Pennsylvania has not recognized an exception to the economic loss doctrine for situations like the fire at One Meridian Plaza. The narrow exception which *Moore* suggested has apparently been rejected in *Glass Kitchens*. Plaintiffs' suggested exception, that economic losses be recoverable where accompanied by the mere threat of physical harm, goes beyond the *Moore* dicta. This exception would also be at odds with the underlying reasoning behind the economic loss doctrine; it would be anomalous if a rule of law which is used to limit liability were discarded in calamitous situations where liability would be greatest. Furthermore, the bright line which determines who may pursue a negligence action would become less bright when attempting to determine exactly what constitutes a threat of harm.

Appendix B

Plaintiffs' attempts to distinguish the Supreme Court cases, *Robins Dry Dock* and *East River Steamship,* are equally unavailing. The only relevance of these cases to the case at bar is the philosophical underpinnings of the economic loss doctrine. The holding in this case rests on Pennsylvania law only. Plaintiffs contend that the two Supreme Court cases were decided based on principles of contractual privity, and, consequently, are readily distinguishable from the present one. While the Court does, in both cases, discuss contractual privity, the economic loss doctrine as it exists today is based on broader grounds than the availability of insurance or the integrity of contract principles. It is based on the desire for and necessity of a bright line rule to limit liability in situations where many parties have been harmed and liability could be almost limitless. The rule of law as it exists in Pennsylvania is not based upon any considerations of contractual privity.

Consequently, I find that for those plaintiffs who brought a claim for negligence but did not allege property damage, namely Triumphe and Sunshine, claims for economic losses based on negligence must be dismissed.

7. Relationship Between Physical Damage and Economic Harm

Perhaps defendants' most important argument is that, in order to recover economic losses, the economic loss must flow directly from the physical harm to plaintiffs' property. Since no plaintiff alleged this causal connection, if defendants' statement of the law is correct, all plaintiffs' claims for economic losses must be dismissed.

Plaintiffs argue that no causal connection is necessary. First,

they offer official comment (b) to *Restatement* § 766C:

> b. *Physical harm to the other.* The rule stated in this Section applies when the plaintiff suffers only pecuniary loss, such as the loss of the financial benefits of a contract or of prospective trade or financial loss through being put to additional expense. If there is physical harm to the person or land or chattels of the plaintiff, the rule stated in this Section does not apply and there may be recovery for negligence that results in physical harm because of the nonperformance of a contract with the plaintiff. (Cf. §§ 435B, 499). This recovery is of course subject to the usual rules governing liability for negligence. When recovery is allowed, the loss of expected profits or other pecuniary loss may, in an appropriate case, be recovered as "parasitic" compensatory damages.

Plaintiffs attach significance to this language, which does not clearly require a causal connection between the physical harm and the economic loss. Furthermore, plaintiffs claim that requiring a correlation between the harm and the loss would contravene an underlying purpose of the economic loss doctrine, which is to establish a bright line rule separating those who may recover for economic loss in a given situation from those who may not. Plaintiffs argue that if the court must make this two pronged analysis (whether there was physical harm at all, and whether the physical harm is the cause of the economic loss), the pragmatism of the rule would be lost.

Defendants, on the other hand, argue that plaintiffs' position is inconsistent with fundamental principles of causation. They argue that if liability is imposed on a party for physical harm, that party is responsible only for those losses directly and proximately resulting from the harm. This, however, begs the question of whether plaintiffs' economic harm was proximately caused by defendants' negligence. The principle of proximate causation has been supplanted by the economic loss doctrine in situations where a defendant's negligence causes purely economic loss. Ordinarily, liability is determined by foreseeability. Nonetheless, the economic loss doctrine precludes recovery for economic loss where there has been no physical harm suffered, even where the economic loss was foreseeable. *See, e.g., Dundee Cement Co. v. Chemical Laboratories, Inc.*, 712 F.2d 1166, 1168 (7th Cir. 1983), where a truck owned by the defendant overturned and spilled flammable liquid onto a highway. As a result of the spill, the highway was closed for some time and access to plaintiff cement company was completely blocked. The court stated that "[t]he causal relation between the [negligence] and the loss of business is direct . . . [O]ne could easily foresee that an accident that forced a road to close and that therefore blocked all access to a company could seriously inconvenience that company . . ." Nonetheless, the plaintiff was deemed "too remove . . . because it was not physically harmed." *Id.* In *Margolis v. Jackson*, 375 Pa. Super. 182, 185, 543 A.2d 1238, 1240 (1988) the court stated that economic loss "is considered beyond the scope of recovery even if a direct result of the negligent act." It is clear that ordinary causation principles do not apply in this case.

More persuasive, however, is defendants' reasoning describing plaintiffs' interpretation of the physical harm requirement as a "trigger" mechanism. According to plaintiffs, pleading property damage of any kind is sufficient to open the door

to recovery for economic loss. To illustrate the disparate effects of the operation of such a rule, defendants offer the following hypothetical:

> [A]ssume two of the 2,500 employees in One Meridian Plaza who are pleaded to have lost their jobs because of the fire had identical jobs with identical claims for lost wages and benefits; employee A left no personal items at the office during the weekend of the fire and employee B left her coat in the closet. Under *Aikens*, Employee A cannot recover his lost wages. It would be absurd to hold that because employee B's coat was damaged she is entitled to now recover the lost wages barred to employee A.
>
> E/R Defendants' Memorandum at 31-32.

In the only Pennsylvania case mentioning the issue, the court in *Mueller v. Pennsylvania Gas Co.*, 54 Erie Co. Legal J. 1 (Erie Co. 1970), *aff'd*, 218 Pa. Super. 923, 279 A.2d 281 (1971), without discussion, stated that recovery for economic loss "is limited to those who have suffered injuries or damage to property which directly results in loss to the owner [of the property]." *Id.* at 9.

A rule requiring some nexus between the physical harm and the economic loss is a wiser, more equitable rule than merely using physical harm as a trigger to recovery for economic loss. Courts are well-equipped to make such causation determinations, and I believe that Pennsylvania courts would require a connection between the physical harm and the economic loss. The *Restatement* comment relating to "parasitic" damages does not

support plaintiffs' interpretation; in fact, it does the opposite. "Parasitic" implies a "symbiotic relationship" and this implies that damages for economic harm must be dependent upon the physical harm to be recoverable. *See In Re TMI Litigation Governmental Entities Claims*, 544 F. Supp. 853, 858 (M.D. Pa. 1982), *vacated on other grounds, Pennsylvania v. General Public Utilities Corp.*, 710 F.2d 117 (3d Cir. 1983).

Furthermore, allowing plaintiffs to recover economic losses upon any showing of physical harm would open the door to a vast number of fraudulent claims. For example, many employees in the above hypothetical would undoubtedly claim that they too had left a coat in the closet. A requirement of some nexus between the physical harm and the economic loss largely prevents that possibility.

For purposes of the case at bar, this means that since none of the plaintiffs have adequately pleaded a causal relationship between the physical harm alleged and the economic losses suffered, and all claims for economic losses deriving from Counts I and II for negligence must be dismissed. However, plaintiffs will be given twenty (20) days to amend the Complaint and plead sufficient facts to comply with this requirement. If plaintiffs cannot properly allege this connection, all claims for economic damages will be dismissed with prejudice.

8. Water, Smoke, Toxins, Debris, Odors and Lack of Access as Physical Harm

Defendants maintain that those plaintiffs who have alleged that their property was touched and physically invaded by smoke, water, airborne toxins, debris, or to whose property access was denied due to the closure of the streets, have not alleged physical

harm as contemplated by the economic loss doctrine and thus these plaintiffs' claims for economic loss must be dismissed. Specifically, Vinciguerra, Corcoran, Chris' Cafe and the Happy Rooster allege physical harm in this way.[20] Plaintiffs, of course, insist that the damage so alleged is sufficient, or that it is a factual matter not suitable for resolution in a motion to dismiss.

Both sides have cited *Pennsylvania v. General Public Utilities Corp.*, 710 F.2d 117 (3d Cir. 1983) in support of their arguments. In that case, plaintiffs argued that radioactive materials emitted during the nuclear incident at Three Mile Island permeated the entire area and constituted a physical intrusion upon the plaintiffs' properties, and that this intrusion is a sufficient showing of physical harm to permit plaintiffs to recover economic losses.[21] *Id.* at 122. The Court of Appeals held that these allegations were sufficient to defeat a motion for summary judgment or a motion to dismiss. Defendants argue that the remaining issue of fact was whether the exposure to radiation actually resulted in property damage. Plaintiffs contend that the Court's holding indicates that the emanation of radioactive materials, analogous to the toxins and debris from One Meridian, can suffice as physical harm.

This issue is intertwined with the issue of whether the physical harm must cause the economic loss in order to recover for

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20. Since the Happy Rooster brought a claim for public nuisance only, this issue is immaterial to it.

21. This issue turned on the interpretation of the term "damage to property" as that term is used within the definition of "nuclear incident" in the Atomic Energy Act of 1954,, 42 U.S.C. § 3011 *et seq.* as amended by the Price-Anderson Act of September 2, 1957, Pub.. L. 85-256, 71 Stat. 576, § 3014(q). Nonetheless, the discussion is still pertinent.

economic loss, discussed above. If the alleged "physical invasion" of smoke, water, odor, debris or toxins caused the economic loss, they are sufficient to be "physical harm." Thus, Vinciguerra, Corcoran and Chris' Cafe may recover for economic loss if they can adequately plead this causal link. Otherwise, these plaintiffs' claims for economic loss will be dismissed.

Defendants also assert that denial of access due to the closing of the streets or barricades is not "physical harm." In *Getty Refining & Marketing Co. v. MT Fadi B.*, 766 F.2d 829, 834 (3d Cir. 1985), the Third Circuit Court of Appeals was confronted with the question of whether a denial of access to navigable water immediately in front of plaintiff's property was physical harm sufficient to permit economic recovery. The court held that this did not constitute physical damage. *Id.* In *Dundee Cement Co. v. Chemical Laboratories, Inc.*, 712 F.2d 1166, 1168 (7th Cir. 1983), discussed above, plaintiff cement company was closed due to defendant's negligence which caused a highway to be closed and access to plaintiff company to be blocked. Plaintiff sued in negligence for its lost profits, and the Court of Appeals affirmed the dismissal of plaintiff's claims since plaintiff suffered no physical injury.

As a practical matter, "physical harm" suggests some physical contact or damage. Denial of access does not fit within this standard. Thus, I find that those plaintiffs who have alleged denial of access or barriers to property do not satisfy the physical harm requirement by so alleging and cannot recover purely economic losses in negligence without some tangible, physical harm. Thus, even if the denial of access caused the economic loss, the loss is not recoverable in negligence absent some other showing of physical harm (which caused the economic loss).

9. Conclusion

As a result of this section of this opinion pertaining to the economic loss doctrine, all plaintiffs' claims for economic losses are dismissed with prejudice, except for the following:

1. Those plaintiffs who brought a cause of action for negligence and pleaded some form of physical harm, namely Ejay, Dembowski, Grandy, Crumlish, Allen, Regent Shoes, Vinciguerra, Corcoran, Royal Bank and Atlee may replead their allegations of physical harm and economic loss, in conformance with this opinion, if and only if they can allege a causal connection between the two, within the context of the negligence count.

2. Ejay, Regent Shoes, LegXpress, Square Corp., Vinciguerra, Corcoran, Sunshine, Royal Bank, Chris' Cafe and the Happy Rooster may replead a count for public nuisance, in conformance with this opinion, if and only if they can allege a substantial impairment of access in addition to severe pecuniary loss.

C. Plaintiffs' Lack of Standing and/or Prematurity of Their Claims

Defendants argue that "presumably some or all of the would-be class members are insured under policies of property damage and/or business interruption insurance which provided coverage for losses sustained in the fire." *See, e.g.*, Delmont's Memorandum at 10. They argue that absent allegations that plaintiffs have already presented such claims and have recovered less than the full amount of their losses, plaintiffs cannot demonstrate that they have actually suffered an uninsured loss and the claims are "premature." Alternatively, they argue that the insurance carriers, and not the plaintiffs, are the "real parties at interest."

Appendix B

In a motion to dismiss, the court must draw all reasonable inferences from the allegations and view them in a light most favorable to the non-moving party. That plaintiffs have actually suffered an uninsured loss is a logical inference one can draw from plaintiff's allegations that they have suffered an uninsured loss. Defendants' arguments in this regard are better suited to a motion for summary judgment.

D. Inclusion of Irrelevant and Impertinent Matters

Rule 12 (f) of the Federal Rules of Civil Procedure authorizes a court to strike from a pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter. However, motions to strike are "disfavored, especially in the absence of prejudice." *See, e.g., J & A Realty v. Asbury Park*, 763 F. Supp. 85 (D. N.J. 1991).

Defendants have identified three categories of allegations which they contend should be stricken. First, three firefighters were killed during the fire at One Meridian which is the subject of this litigation. Despite the fact that none of the plaintiff classes include Philadelphia firefighters and that plaintiffs do not assert claims for wrongful death or personal injury, the Complaint repeatedly makes reference to the firefighters and the dangers encountered by those fighting the fire. Second, the Complaint repeatedly refers to statements made by the Philadelphia Fire Commissioner and Fire Marshall. Press reports are also cited. Finally, the Complaint contains a variety of colorful statements. For example, the Building is referred to as a "towering inferno" and the fire is described as having "roared" through the roof.

I agree that references to the firefighters' deaths and statements made by public officials and the press are immaterial and are hereby stricken.

Appendix B

E. Failure to State a Claim for Punitive Damages

Several defendants have argued that the Complaint fails to allege facts which support a cause of action for punitive damages against them. They contend that plaintiffs have inserted conclusory allegations for punitive damages in the Complaint without a sufficient set of facts to support them.

Under Pennsylvania law, punitive damages are awarded to punish outrageous conduct. *Olsen v. United States*, 521 F. Supp. 59 (E.D. Pa. 1981), *aff'd sub nom, Ford Motor Company v. Cooper*, 688 F.2d 820 and 688 F.2d 823 (3d Cir.), *cert. denied*, 459 U.S. 1107 (1982). Plaintiffs must establish that defendants' acts were outrageous because of the defendants' evil motive or their reckless indifference to the rights of others. *Feld v. Merriam*, 506 Pa. 383, 485 A.2d 742, 747 (1984) (adopting *Restatement* (Second) of Torts § 908(2)). The act must be intentional, reckless or malicious. *Id.* at 748. In deciding whether to impose punitive damages, a court should not look at the end result, but rather should examine the actor's conduct. *Id.* It is not sufficient that the defendant failed to appreciate a risk; rather, there must be indifference to a known risk. *SHV Coal, Inc. v. Continental Grain Co.*, 526 Pa. 489, 587 A.2d 702 (1991).

Generally, plaintiffs allege that some defendants knew of the inadequacies of the equipment and fire detection and suppression systems and products before the fire, and that the failure to rectify the situation showed reckless indifference to the plaintiffs' interests. The allegations against each defendant must be analyzed against this standard to determine whether the Complaint contains sufficient facts to support a demand for punitive damages.

Appendix B

1. Delmont.

The Complaint specifically alleges that Delmont knew or should have known that the Building's standpipe system, pumps and the reducing valves were installed improperly and negligently. (¶ 100).[22] I cannot say as a matter of law that Delmont's conduct, if proven as alleged in the Complaint, was not "outrageous" so as to support an award of punitive damages. Accordingly, Delmont's motion to dismiss plaintiffs' counts for punitive damages is denied.

2. E/R Defendants

The Complaint alleges that the Owner/Manager Defendants knew that there was inadequate water pressure in the standpipe system on several floors prior to the fire (¶ 97), knew or should have known that the Building's standpipe system, pumps and the reducing valves were installed improperly and negligently (¶ 100), knew that on February 14, 1991, there was no water pressure in the bathrooms or kitchens of the 17th and 18th floors of the Building (¶ 123), and knew on Friday, February 22, 1991, the day before the fire, that the public Concourse adjacent to the basement of the Building was flooded by water (¶ 124). A number of other allegations raise the inference that the Owner/Manager Defendants were unconcerned with the fire protection and suppression systems, choosing instead, for example, to make aesthetic and cosmetic changes to the Building. (¶ 114). I cannot say as a matter of law that the E/R Defendants' conduct, if proven as alleged in the Complaint, was not "outrageous" so as to support

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22. This paragraph makes the same allegations against the Owner/Manager Defendants and Penn Sprinkler. Penn Sprinkler did not move to dismiss the punitive damage claims.

an award of punitive damages. Accordingly, the E/R Defendants' motion to dismiss plaintiffs' counts for punitive damages is denied.

3. Griffin and Balis

Plaintiffs' allegations against Balis and Griffin are related to their failure to "segregate, store and safekeep flammable and combustible liquids, finishes and other materials and conditions tending to create fire hazards." (¶ 131). These allegations involve purely negligent conduct which does not support a claim for punitive damages. *See McDaniel v. Merck, Sharp & Dohme*, 367 Pa. Super. 600, 533 A.2d 436, 447-48 h(1987), *app. den.*, 520 Pa. 589, 551 A.2d 215 (1988) and *app. den., Petition of Merck, Sharp & Dohme*, 520 Pa. 589, 551 A.2d 216 (1988) (dismissing punitive damage claims against defendants where only facts alleged against them constituted ordinary negligence). Thus, claims for punitive damages against defendants Griffin and Balis are dismissed.

4. ABM

Allegations against ABM also simply amount to negligence. The Complaint alleges that personnel on duty the night of the fire were inadequately trained (¶ 56), that ABM employees failed to investigate a strong odor on the 22nd floor (¶ 134-135), that an ABM employee improperly used an elevator to determine if there was a fire on the 22nd floor (¶ 143) and ABM employees failed to notify the Philadelphia Fire Department that there was a fire in the Building (¶ 147). There are no allegations against ABM regarding, for example, prior knowledge of dangerous conditions. The allegations against ABM are not sufficient to support an award of punitive damages. Accordingly, punitive damages claims against ABM are dismissed.

Appendix B

5. National Guardian

The allegations against National Guardian are that they failed to respond to the fire alarm call and/or that they installed, maintained, and/or inspected the failed automatic dialer located in the basement of One Meridan Plaza on the night of the fire. Without more information as to the circumstances surrounding the failure to respond to the fire alarm call, I cannot say that National Guardian's conduct was not "outrageous." National Guardian's motion to dismiss punitive damage claims against it is denied.

6. Rodin

Since Rodin is an Owner/Manager Defendant, the above section pertaining to the E/R Defendants applies equally to Rodin.[23] Thus, Rodin's motion to dismiss plaintiffs' claims for punitive damages is denied.

F. Failure to State a Claim for Attorneys' Fees

Defendants argue that plaintiffs have "alleged no basis in fact or in law, nor does none exist, that would permit an award of attorneys' fees on the causes of action alleged and the claims for such should be dismissed." Delmont's Memorandum at 13. Plaintiffs counter that where, as here, plaintiffs seek the creation of a fund by judgment, the prevailing class may be awarded attorneys' fees. *See Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980). A fund by judgment is a fund recovered by a litigant or a lawyer for the benefit of someone other than himself or his client.

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23. Unlike ABM, Rodin has not moved to segregate itself from the classification of "Owner/Manager Defendants" in the Complaint, and I will not infer the distinction merely because they filed a separate motion to dismiss.

Id. at 478. The common fund doctrine arose from the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense. *Id.* at 478. This inequity can be prevented by assessing attorneys' fees against the fund. However, the defendant cannot be obliged to pay fees awarded to the class lawyers. *Id.* at 482. Thus, plaintiffs' request for attorneys' fees is not really from the defendants but from a fund for judgment, if one ever arises. Plaintiffs' demand for attorneys' fees is not appropriate in the Complaint, and thus I grant defendants' motion to dismiss plaintiffs' claims for attorneys' fees, without prejudice to recover same in accordance with the above statement of the law.

G. Motion for a More Definite Statement

Defendants have moved under Fed. R. Civ. P. 12(e)[24] for a more definite statement. Specifically, Delmont argues that references throughout the complaint not "defendants" are unclear and leave each defendant guessing as to which defendant that

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24. Fed. R. Civ. P. 12(e) states:

> Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

allegation refers. Plaintiffs respond that the Complaint clearly states that "unless otherwise indicated the term 'defendants' refers to all of the above-named defendants." I believe that this definition of "defendants" is sufficiently clear to allow the defendants to answer. If a defendant was not involved in the events which form the allegations within a paragraph of the Complaint, that defendant should appropriately respond to that paragraph in its answer. Furthermore, this opinion will clarify which causes of action remain against each defendant. Defendants' motion for a more definite statement is denied.

H. Negligence Per Se

Defendants argue that Count I of the Complaint, alleging Negligence Per Se, should be stricken or dismissed as it does not constitute a separate cause of action but is merely an evidentiary doctrine, and that is is duplicative of the general assertions of negligence contained in Count II. This count alleges violations of the Philadelphia Code, a municipal ordinance the violation of which, defendants contend, is not sufficient to establish negligence per se.

Negligence per se is a concept which permits a party to carry its burden of proving negligence by establishing conduct violative of a statute or similar enactment. *White v. Southeastern Pennsylvania Transp. Authority,* 359 Pa. Super. 123, 135, 518 A.2d 810, 816 (1986). The party must also show:

> 1) that the statute was intended to protect the plaintiff as an individual; 2) that the type of harm sustained was the type against which the legislature intended to prevent; 3) that the type of hazard or danger which caused the harm was

> a danger which the legislature intended to prevent, and 4) that the violation was the legal cause of the injury.

Villaume v. Kaufman, 379 Pa. Super. 561, 566, 550 A.2d 793, 796 (1988).

In *Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135, 1154 (E.D. Pa. 1982) the District Court, in dicta, stated that violations of the Philadelphia Code may permit a finding of negligence per se. In *Githens, Rexsamer & Co. v. Wildstein*, 443 Pa. 480, 277 A.2d 157, 158 (1971), the court held that a violation of the Philadelphia Fire Code did not establish negligence since the plaintiff could not show a causal connection between the violation and the spread of the fire which damaged plaintiff's property. However, this suggests that if plaintiff could prove causation, the fire code violation would be enough to establish negligence.

Defendants have cited several cases which, they claim, hold that violation of a municipal ordinance does not create a factual basis for negligence per se. *See, e.g., Jinks v. Currie*, 324 Pa. 532, 538, 188 A. 356 (1936); *Wisniewski v. Chestnut Hill Hospital*, 403 Pa. 610, 170 A.2d 595, 596 n. 1 (1961). More recent decisions, however, indicate more clearly that violation of municipal ordinances may indeed be the basis of negligence per se.

Defendants also argue that the negligence per se count, if not dismissed, would permit plaintiffs to recover in what amounts to strict liability. This argument is resolved by the causation requirement; there is certainly no liability without fault. To recover on this negligence theory, plaintiffs must prove far more then a mere violation of the Code; they must prove causation. *See, e.g., White* ("The violation must be the legal cause of the injury.")

Based on the foregoing, I find that negligence per se may be based on violations of the Philadelphia Code. Furthermore, I believe that negligence based on violation of the Philadelphia Code may be separate and distinct from negligence based on breach of some other duty since the liability flowing from the violation of the Code is limited to damages proximately caused by the violation, while the "other" negligence may have proximately caused other damage. Accordingly, defendants' motion to dismiss Count I of the Complaint is denied.

I. Lack of Jurisdiction

ABP argues that this court lacks personal and subject matter jurisdiction over it. This issue has been resolved in an order dated January 26, 1993, denying ABP's motion to dismiss on the same grounds in a related case before this court, *Federal Insurance Co. v. Richard I. Rubin & Co., Inc.*, Civil Action No. 92-4177. Thus, ABP's motion to dismiss on these jurisdictional grounds is denied.

J. Impermissible Split of Causes of Action

Defendants[25] argue that plaintiffs have impermissibly split their causes of action in seeking only uninsured damages and/or losses. (¶ 225). In its reply memorandum, Balis has attempted to explain its position:

> Balis' contention is simply that if the plaintiffs persist in pursuing their uninsured losses only, a subsequent suit by the plaintiffs or their insurers to recover the insured loss will be

25. Defendants Balis and ABM raised this argument, but only Balais discussed it in its memorandum (and reply memorandum).

> barred . . . The plaintiffs may pursue a claim for uninsured losses only, but when they do so they foreclose the rights of their insurers as subrogees.
>
> Balis' Reply Memorandum at 28.

If that is Balis' argument, it is inappropriately raised in these proceedings. If Balis wishes to raise this argument in a case for those insured losses, they are welcome to do so.

Moreover, Balis has cited several Pennsylvania cases in support of this argument. *See Spinelli v. Maxwell,* 430 Pa. 478, 243 A.2d 425, 427 (1968); *see also Travelers Ins. Co. v. Hartford Acci. & Indem. Co.,* 222 Pa. Super. 546, 294 A.2d 913, 915 (1972). In federal court, procedural issues such as joinder of parties are subject to federal law and the Federal Rules of Civil Procedure, not state law. *See St. Paul Fire & Marine Insurance Co. v. Peoples Natural Gas Co.,* 166 F. Supp. 11 (W.D. Pa. 1958) (The question of whether a partial subrogee may maintain an action in a federal court alone without joining other real parties in interest is a procedural question covered by the Federal Rules of Civil Procedure and must be answered in the affirmative . . . Defendants are protected from a multiciplicity of suits by its opportunity to join the necessary parties). *See also Royal Indemnity Co. v. Erie,* 326 F. Supp. 571 (W.D. Pa. 1971) ("Regardless of what Pennsylvania rule may be with respect to splitting causes of action," a partial subrogee alone may bring suit against tortfeasor.)

Defendants' motion to dismiss on this ground is denied.

Appendix B

V. Conclusion

Based on the foregoing, Count III for Strict Liability — Ultrahazardous Activity and Count IV for trespass are dismissed in their entirety. Count V for private nuisance is dismissed with prejudice against the following plaintiffs: Dembowski, Grandy, Crumlish, Allen, Atlee and Triumphe, and all claims for private nuisance, insofar as they demand damages for economic loss, are dismissed with prejudice. Count VI for public nuisance is dismissed with prejudice against the following plaintiffs: Dembowski, Grandy, Crumlish, Allen, Atlee and Triumphe. Count VI for public nuisance is dismissed without prejudice against the following plaintiffs, with leave to amend within twenty (20) days in conformance with this opinion: Ejay, Regent Shoes, LegXpress, Square Corp., Vinciguerra, Corcoran, Sunshine, Royal Bank, Chris' Cafe and the Happy Rooster. Claims for economic loss grounded in negligence are dismissed, with prejudice, against the following plaintiffs: Triumphe and Sunshine. Claims for economic loss ground in negligence are dismissed, with leave to amend within twenty (20) days in conformance with this opinion, against the following plaintiffs: Ejay, Dembowski, Grandy, Crumlish, Allen, Regent Shoes, Vinciguerra, Corcoran, Royal Bank and Atlee. Claims for punitive damages are dismissed against the following defendants: Griffin, Balis and ABM. Plaintiffs' request for attorneys' fees is dismissed, without prejudice. All references to the firefighters who died in the fire and statements made by public officials and press reports are stricken from the Complaint. The motions to dismiss filed by defendants before the Complaint was filed (Docket numbers 5, 9, 12, 30) are denied as moot.

An order follows.

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED JANUARY 26, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 92-4177

FEDERAL INSURANCE COMPANY, et al.,

Plaintiff

v.

RICHARD I. RUBIN & CO., INC., et al.,

Defendant.

MEMORANDUM

BUCKWALTER J. January 26, 1993

Plaintiff, Federal Insurance Company, commenced this litigation against Defendants, Algemeen Burgerlijk Pensioenfonds ("ABP") and its wholly owned subsidiary, USA Holding B.V. ("USA Holding"), seeking compensation for damages as a result of events surrounding the Meridian Bank Plaza fire that occurred on February 23, 1991 in Philadelphia, Pennsylvania.

Presently before the Court is Defendants' Motion to Dismiss Plaintiff's complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(2) for lack of subject matter and personal jurisdiction. Specifically, Defendants claim immunity from suit in

the United States in accordance with the provisions of the Foreign Sovereign Immunities Act ("FSIA")[1] based upon their status as foreign sovereigns. Defendants further aver that none of the exceptions to foreign sovereign immunity are applicable.

For the following reasons, Defendants' Motion to Dismiss is DENIED.

I. Statement of Facts

Plaintiff is one of several insurance companies seeking compensation from numerous defendants for damages resulting from the One Meridian Bank Plaza fire occurring in February, 1991. With respect to the Defendants in the present case, Plaintiff has alleged several theories of liability, including breach of contract and negligence.

Defendant ABP is a corporation organized and existing pursuant to the laws of the Netherlands and serves as the Netherlands' General Civil Pension Fund. ABP is the parent corporation of Defendant USA Holding, which is also a corporation organized and existing pursuant to the laws of the Netherlands.[2] USA Holding is the parent corporation of two wholly owned subsidiaries, USA One B.V. and USA Two B.V.,[3]

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1. 28 U.S.C.A. §§ 1601 - 1611 (West Supp. 1992).

2. Defendants' principal places of business are disputed by the parties: Plaintiff alleges that both Defendants maintain their principal places of business in Philadelphia, Pennsylvania, whereas Defendants contend that their principal places of business are in the Netherlands.

3. USA One B.V. and USA Two B.V. do not dispute personal jurisdiction or subject matter jurisdiction in this case because the exceptions to the immunity established under the FSIA apply to them.

which were incorporated *inter alia* "to invest in, purchase, sell, manage, and rent real estate in the United States." Although USA One B.V. and USA Two B.V. are organized pursuant to the laws of the Netherlands, these subsidiaries are general partners in USA One Associates, a Pennsylvania partnership created to acquire an interest in E/R Associates, a joint venture with a fee interest in the One Meridian Bank Plaza building.

Defendant ABP financed USA One Associate's acquisition of a sixty-five percent interest in E/R Associates through an unsecured loan. The loan was executed pursuant to the laws of the Netherlands, and payments were made to Defendant ABP in the Netherlands.[4] Once USA One Associates acquired its interest in E/R Associates, it retained Rodin Investment Administration Company ("Rodin") to oversee the day to day operations of USA One Associate's investments, and to make certain decisions regarding the management and operation of One Meridian Plaza. U.S. Alpha, Inc. subsequently replaced Rodin in its capacity to make decisions regarding the management of the building.

Defendants move to dismiss Plaintiff's claims alleging that they are agencies or instrumentalities of a foreign state, and are accordingly immune from suit in the United States because none of the FSIA's exceptions waiving immunity are applicable. Moreover, Defendants contend that under the provisions of the FSIA, ABP and USA Holding should be considered separate juridical entities[5] of a foreign state, thereby precluding the court

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4. Although USA One Associates maintains a bank account in New York, it is unclear whether this account serves as the fund to make payments to ABP.

5. Although the precise definition of foreign juridical entities remains unclear, it appears to be an instrumentality of a foreign state with specific powers "to hold and sell property and to sue and be sued." See First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 624 (1983).

from "piercing the corporate veil" and imposing liability upon ABP and USA Holding for the actions of its subsidiaries.

Plaintiff, however, alleges that despite Defendants' status as foreign juridical entities, the FSIA's "commercial activity" exception applies to ABP and USA Holding, and provides a basis for this Court to exercise subject matter and personal jurisdiction. Plaintiff asserts that Defendants' ownership interests in Meridian Bank, in addition to Defendant ABP's presence at a meeting in Philadelphia where the participants discussed issues pertinent to the management and operation of Meridian Plaza, is sufficient to constitute "commercial activity in the United States" pursuant to the provisions of the FSIA.

II. Discussion

A. Subject Matter Jursisdiction under The Foreign Sovereign Immunity Act

The objective of the Foreign Sovereign Immunity Act is to "facilitate bringing suits against foreign governments arising out of commercial activity in the United States courts," and is designed to provide a "uniform statutory procedure for establishing subject matter jurisdiction and personal jurisdiction over foreign entities . . . ." *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 816-17 (3rd Cir. 1981). The FSIA provides the exclusive source of subject matter jurisdiction over suits involving foreign states or their instrumentalities. *Joseph v. Office of Consulate Gen.*, 830 F.2d 1018, 1021 (9th Cir. 1987), citing *De Letelier v. Republic of Chile*, 748 F.2d 790, 793 (2nd Cir. 1984); *Gould Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450 (6th Cir. 1988) ("[t]he subject matter jurisdiction granted to district courts by the FSIA in 28 U.S.C. § 1330(a) is based upon federal question jurisdiction"). Under the

statutory scheme of the FSIA, a United States court can exercise subject matter jurisdiction over a foreign state or instrumentality only if an exception to sovereign immunity applies.[6] Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1604 (West Supp. 1992) ("[s]ubject to certain international agreements to which the United States is a party at the time of enactment of this Act, a foreign state shall be immune from the jurisdiction of a court of the United States . . . except as provided in sections 1605 to 1607 of this chapter.").

In FSIA cases, the ultimate burden of proving immunity from jurisdiction rests squarely with the foreign state. H.R. Rep. No. 1487, 94 Cong., 2d Sess. 1, 17 *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6616.[7] Defendants have the initial burden of

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6. Exceptions to immunity include, inter alia, waiver, commercial activity; property rights taken in violation of international law, property rights in United States property that are acquired by gift or succession, or property rights in immovable United States property; money damages against a foreign state for personal injury or death, or damages to property. See Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1605 (West Supp. 1992).

7. According to the legislative history of the FSIA:

> [T]he burden will remain on the foreign state to produce evidence in support of its claim of immunity. Thus, evidence must be produced to establish that a foreign state or one of its subdivisions, agencies or instrumentalities is the defendant in the suit and that the plaintiff's claims relate to a public act of the foreign state – that is, an act not within the exceptions in sections 1605-1607. Once the foreign state has produced such prima facie evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence

(Cont'd)

establishing that they qualify as foreign sovereigns as defined by the FSIA. *Id.* Once Defendants produce such *prima facie* evidence of immunity, Plaintiff must present evidence that an exception to sovereign immunity applies which would permit this Court to exercise jurisdiction. *Id.*

As a preliminary matter, this Court must consider whether Defendants correctly allege that they qualify as "foreign sovereigns or instrumentalities" as defined by the provisions of the FSIA. The FSIA defines a "foreign state" as a "political subdivision of a foreign state or an agency or instrumentality of a foreign state." Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1603(a) (West Supp. 1992). The Act further defines "agency or instrumentality" as any entity:

> 1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a

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(Cont'd)

> establishing that the foreign state is not entitled to immunity. *The ultimate burden of immunity rests with the foreign state.*

H.R. Rep. No. 1487, 94 Cong., 2d Sess. 1, 17 *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6616 (emphasis added). Although the legislative history and § 1604 of the Act require the defendants to establish (a) that they qualify as foreign states, and (b) that the complaint relates to a public act, several jurisdictions have concluded that the legislative intent of the act is effectuated by allowing defendants to prove their status as a foreign sovereign, followed by plaintiff's evidence that an exception to immunity is applicable. *See, Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 256 (7th Cir. 1983) ("... the purposes of the act will best be served by requiring that defendant demonstrate that the suit relates to a governmental act of the foreign state being sued, and then placing the burden of identifying the relevant exception... upon plaintiff.").

> foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a state of the United States . . . not created under the laws of any third country.

Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1603(a) (West Supp. 1992).

Based upon these definitions, this Court concludes that ABP and USA Holding are foreign sovereigns as contemplated by the FSIA. First, ABP is a separate legal person possessing corporate capacity under Dutch law, and was created as the General Civil Pension Fund by statutory enactment of the Dutch Parliament. Second, ABP is managed by a thirteen member committee subject to the control of the Dutch Government. Third, ABP has no shares of stock or other certificates of ownership existing or contemplated in connection with ABP. Finally, ABP is not a citizen of the United States and is not created under the laws of a third country.

USA Holding qualifies as a foreign sovereign and satisfies the characteristics of an agency or instrumentality of a foreign state as enumerated in § 1603(b) of the FSIA. USA Holding is a wholly owned subsidiary of ABP, organized and existing pursuant to the laws of the Netherlands. In addition, USA Holding is not a citizen of the United States, and is not created under the laws of any third country. *See O'Connell Machinery Co. v. M.V. Americana,* 734 F.2d 115 (2nd Cir. 1984) (where majority of shares of corporation owned by entity under the direct control of a public financial entity which coordinated management of commercial enterprises of the Italian Government, corporation qualified as an "agency of instrumentality" of the Republic of Italy).

Appendix C

Now that Defendants have presented *prima facie* evidence that they are entitled to immunity, Plaintiff has the burden to establish that an exception to immunity applies that would allow this Court to exercise subject matter jurisdiction. Plaintiff asserts that Defendants are not immune from suit in the United States because their activity is within the scope of the commercial activity exception set forth in § 1605(a)(2) of the FSIA. In order to evaluate whether this Court can exercise subject matter jurisdiction in this case, the Court must consider whether Defendants' conduct constitutes commercial activity; and second, whether Defendants' activities fall within the scope of the commercial activity exception.

"Commercial activity" is broadly defined as "a regular course of commercial conduct of a particular commercial transaction or act." Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1603(d) (West Supp. 1992). This definition affords courts considerable latitude in evaluating what types of activity constitute commercial activity. H.R. Rep. No. 1487, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6615. The commercial character of an activity should be determined "by reference to the nature and the course of conduct or particular transaction or act, rather than by reference to its purpose." Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1603(d) (West Supp. 1992); *see also, Joseph,* 830 F.2d at 1024 (commercial activity generally includes activity conducted by a sovereign for a profit and activity that can be performed by a private actor). The FSIA's legislative history also provides some guidance as to the type of transactions that Congresss contemplated would be commercial activity:

> [a]ctivities such as a foreign government's sale of a service or product, its leasing of property, its borrowing of money, its employment or

> engagement of laborers, clerical staff or public relations or marketing agents, *or its investment in a security of an American corporation,* would be among those included within the definition tof commercial activity.

H.R. Rep. No. 1487, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6615 (emphasis added).

A foreign sovereign does not abrogate its sovereign immunity simply because it engages in commercial activity. Sovereign immunity is waived however, if the foreign sovereign's activity falls within the scope of three types of commercial activity as defined by the commercial activity exception:

> (1) a commercial activity carried on in the United States by the foreign state;
>
> (2) an act performed within the United States in connection with a commercial activity of the foreign state elsewhere; or
>
> (3) an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes direct effect in the United States.

Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1605 (a)(2) (West Supp. 1992).[8] The commercial activity exception applies

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8. Moreover, each clause of the commercial activity exception employs a separate standard to determine if a particular activity falls within the scope of the exception. In order to qualify as "commercial activity carried on in the United States by the foreign state," the activity must have "substantial contact" with the United

(Cont'd)

only if the foreign sovereign has a "jurisdictional nexus" to the United States, and the Plaintiff's cause of action is based upon the commercial acts of the foreign sovereign. *Stena Rederi AB v. Comision De Contratos Del Comite*, 923 F.2d 380, 386 (Sth Cir. 1991); *Joseph*, 830 F.2d at 1023 (courts must examine "whether the particular conduct giving rise to the claim in question actually constitutes or is in connection with commercial activity . . . ").

Plaintiff specifically alleges that Defendants engaged in "commercial activity in the United States." According to Plaintiff, Defendants' commercial activity is evidenced by the fact that Defendants have ownership interests in the Meridian Bank building. Plaintiff further contends that Defendants engaged in commercial activity in the United States by functioning as more than "mere investors," and suggests that Defendant ABP "retained ultimate control of these entities and agents [USA Holding, USA one B.V. and USA Two B.V.], and made key decisions on the building's systems and the building's management." Plaintiff attempts to buttress this contention by arguing that ABP's representatives were present at a meeting held by Rodin in Philadelphia, Pennsylvania, to discuss several issues pertinent to the management and administration of the Meridian Bank

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(Cont'd)

States. *Stena Rederi AB v. Comision De Contratos Del Comite*, 923 F.2d 380, 389 N.11 (5th Cir. 1991). In order to satisfy the second clause of the commercial activity exception, "an act performed within the United States in connection with a commercial activity of the foreign state carried on in the United States. *Id.* at 388, *citing, Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 & n.22 (D.C. Cir. 1987). Finally, in order for the activity to qualify as an "act outside the United States in connection with the foreign sovereign's commercial activity elsewhere . . . that causes a direct effect in the United States," an effect is considered direct if it "follows as an immediate consequence of the defendant's activity." *Republic of Argentina v. Weltover, Inc.*, 112 S. Ct. 2160, 2168 (1992).

Building. The minutes of this meeting reflect that ABP attended the meeting, which Plaintiff alleges demonstrates that ABP was actively involved in the operation of the building.

Defendants counter Plaintiff's allegations by asserting that their ownership interests are insufficient to constitute commercial activity. Defendants contend that courts presumQ that agencies and instrumentalities of a foreign state are separate juridical entities, and that courts are only willing to "pierce the corporate veil" in limited circumstances not applicable to the Defendants in the present action. Accordingly, Defendants argue that its ownership interests in USA One B.V. and USA Two B.V. are not sufficient to constitute commercial activity as defined by the FSIA.

This Court concludes that ABP and USA Holding did not satisfy the "ultimate burden" of establishing that they are immune from suit in the United States. Defendants engaged in commercial activity as defined by the FSIA, thus exempting Defendants from immunity since such activities are within the scope of the commercial activity exception of the Act. With respect to Defendant USA Holding, the relevant inquiry is whether USA Holding's ownership of two subsidiaries which formed a Pennsylvania partnership that acquired a majority interest in the Meridian Building is sufficient to constitute commercial activity in the United States. Not only must USA Holding's be engaged in commercial activity, USA Holding must have "substantial contacts" with the United States in order to satisfy the requirements of this clause of the commercial activity exception. *Stena Rederi AB v. Comision De Contratos Del Comite*, 923 F.2d at 389 n.11.

USA Holding engaged in commercial activity as defined by the FSIA by virtue of its ownership interest in USA One B.V. and

USA Two B.V. Although these subsidiaries were incorporated pursuant to the laws of the Netherlands, they subsequently formed the general partnership of USA One Associates, a Pennsylvania partnership. Therefore, USA Holding's ownership of USA One B.V. and USA Two B.V. (USA One Associates), is clearly the type of transaction that Congress contemplated would fall within the definition of commercial activity. H.R. Rep. No. 1487, *reprinted in* 1976 U.S. Code Cong. § Admin. News 6604, 6615 ("investment in a security of an American corporation" constitutes commercial activity).

Since USA Holding's ownership interest is clearly commercial activity as defined by the FSIA, the relevant inquiry is whether this commercial activity is sufficient to constitute "commercial activity in the United States," which is broadly defined as "commercial activity carried on by the foreign state having substantial contact with the United States." Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(e) (West Supp. 1992). This Court concludes that it does.

USA One Associates was organized pursuant to the laws of Pennsylvania with the specific purpose of acquiring and renting real estate in the United States. USA One Associates owns a majority ownership interest in One Meridian Plaza and the obligations associated with acquisition of United States property and principal ownership of such property is sufficient to constitute substantial contact. Therefore, USA One Associates, and consequently USA Holding by virtue of its status as a parent corporation, satisfy the required jurisdictional nexus such that this Court can exercise subject matter jurisdiction over USA Holding.

With respect to Defendant ABP, ABP's activities are also sufficient to fall within the scope of tha commercial activity

exception based upon two alternative theories. First, this Court can exercise subject matter jurisdiction based upon the third clause of the commercial activity exception: "an act outside the United States in connection with a commercial activity elsewhere that causes a direct effect in the United States." Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1605 (a)(2) (West Supp. 1992). Under this standard, ABP's activity must have a direct effect in the United States, meaning, an "effect" that "follows as an immediate consequence of defendant's activity." *Republic of Argentina v. Weltover, Inc.*, 112 S.Ct. 2160, 2168 (1992) (foreign sovereign's unilateral rescheduling of bond payments had a direct effect in the United States).

Defendant ABP, through what it contends was an arms length transaction, provided an unsecured loan to USA One Associates for the purpose of acquiring an interest in E/R Associates, a United States joint venture with a fee interest in Meridian Plaza. The loan was negotiated and executed in the Netherlands, and payment was to be received in the Netherlands in U.S. currency. Although USA One Associates maintains a bank account in the United States, it is unclear whether this account serves as the source of payment to Defendant ABP. Although this activity may not be beyond the scope of transactions typically engaged in by related corporations, it is nevertheless sufficient to provide a viable basis for this Court to exercise subject matter jurisdiction.

ABP's contractual negotiations regarding the terms and conditions of the USA One Associate's loan in the Netherlands constitutes commercial activity as defined by the FSIA. *Stena*, 923 F.2d at 387 n.9 ("commercial activity includes contract negotiations and contractual obligations"). Moreover, ABP's commercial activity is within the purview of the commercial activity exception's direct effects test because USA One Associates' acquisition of a majority interest in the Meridian

building followed as an "immediate consequence" of this loan transaction. Therefore, this Court concludes that ABP engaged in commercial activity having a direct effect in the United States, and is accordingly subject to this Court's jurisdiction.

An alternative theory is that ABP is subject to jurisdiction if this Court "pierces the corporate veil" and considers ABP and USA Holding one corporate entity. *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983). Based upon this theory, ABP would be subject to jurisdiction for the same reason as USA Holding: investment in an American corporation constitutes substantial commercial activity in the United States. H.R. Rep. No. 1487, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6615. Although Defendants contend that agencies and instrumentalities of a foreign state should be accorded independent status, this theory is not without exceptions. *First Nat. City Bank*, 462 U.S. at 629; H.R. Rep. No. 1487, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6628-6629. A court may disregard the independent status of an agency or instrumentality of a foreign state if there is evidence that the "corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created," or where adhering to the presumption would "work fraud or injustice," by defeating the purpose of legislative policies. *First Nat. City Bank*, 462 U.S. at 629.

As to the first exception, there is insufficient evidence to conclude that there is a principal-agency relationship exists between ABP and USA Holding. The most persuasive evidence suggesting such a relationship is that USA Holding is the wholly owned subsidiary of ABP; however, one hundred percent ownership interest alone, is not evidence of "extensive control" justifying a conclusion that a principal-agency relationship exists between a ABP and USA Holding. *Foremost-McKesson Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 448 (D.C. Cir. 1990).

Although Plaintiff contends that ABP attended a meeting in Philadelphia regarding, *inter alia*, issues pertinent to the operation of Meridian Plaza as evidence that ABP made significant decisions regarding the building's operations, Defendants assert that the parties listed as representing ABP at the meeting were not ABP employees. Furthermore, while ABP financed (through an unsecured loan) USA One Associate's acquisition of a 65% ownership interest in the Meridian building, this does not evince "extensive control" or warrant the conclusion that this transaction is beyond the scope of normal corporate activities between parent and subsidiary corporations.

The Court can however, ignore the presumption ot independent status on the second grounds, i.e., that adhering to the presumption would result in fraud and injustice in contravention of legislative policies. *First Nat. City Bank*, 462 U.S. at 629. Since the FSIA was enacted to ensure that foreign sovereigns could obtain immunity from suit in the United States for a foreign state's "public" rather than commercial activities, allowing ABP to claim a shield of immunity in this circumstance, particularly at this stage of the litigation before any discovery has commenced, would enable ABP to circumvent its obligations for violations of the United States laws, while nevertheless reaping the benefits of investing in United States property. Accordingly, ABP's independent status is disregarded, and ABP is therefore subject to the jurisdiction of this Court based upon the FSIA's commercial activity exception.

B. Personal Jurisdiction under the Foreign Sovereign Immunities Act

Defendants also move to dismiss Plaintiff's claims based upon lack of personal jurisdiction pursuant to Federal Rule of Civil

Procedure 12(b)(2). Essentially, Defendants' contention that this Court lacks personal jurisdiction is predicated upon its argument that this Court lacks subject matter jurisdiction pursuant to the requirements of the FSIA. Aside from lack of subject matter jurisdiction, Defendants offer no additional evidence to support its assertion that this court lacks personal jurisdiction.

Personal jurisdiction over the sovereign exists when minimum contacts and the requirements for service set forth in §§ 1605-1608 are satisfied. *Velidor,* 653 F.2d at 817. Based upon these provisions, two requirements must be satisfied in order for this Court to exercise personal jurisdiction under 28 U.S.C. § 1330(b).[9] First, the claim must be one which the court has original jurisdiction under section 1330(a),[10] meaning a claim that the foreign state does not have immunity based upon exceptions to the FSIA. H.R. Rep. No. 1487, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6612. Second, there must be proper service of process in accordance with § 1608 of the FSIA. *Id.; see also, Velidor,* 653 F.2d at 817 ("to summarize this scheme, subject matter jurisdiction plus service equals personal jurisdiction").

Since this Court concludes that it can exercise subject matter jurisdiction based upon the commercial activity exception of the

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9. 28 U.S.C. § 1330(b) provides in relevant part that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title." 28 U.S.C.A. § 1330(b) (West Supp. 1992).

10. Section 1330(a) provides in relevant part that: "[t]he district courts shall have original jurisdiction . . . of any non-jury civil action against a foreign state as defined in section 1603(a) . . . to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

FSIA, and Defendants offer no other basis to question this Court's ability to exercise personal jurisdiction, this Court concludes that the requirements for personal jurisdiction have been satisfied in accordance with §§ 1330(a), 1330(b), and 1608. Accordingly, Defendants' Motion to Dismiss is DENIED.

An appropriate order follows.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 92-4177

FEDERAL INSURANCE COMPANY, et al.,

Plaintiff

v.

RICHARD I. RUBIN & CO., INC., et al.,

Defendant.

ORDER

AND NOW, this 26th day of January, 1993, in consideration of Defendants', Algemeen Burgerlijk Pensioenfonds and USA Holding B.V., Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(2), Plaintiff's opposition to Defendants' Motion, and Defendants' Reply Memorandum in Support of its Motion to Dismiss, it is hereby ORDERED and DECREED that Defendants' Motion to Dismiss is DENIED.

BY THE COURT:

s/ Ronald L. Buckwalter
RONALD L. BUCKWALTER, J.

No. 93-1536

(2)

Supreme Court, U.S.
FILED
MAY - 2 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

EJAY TRAVEL, INC., NANCY DEMBOWSKI, VIRGINIA L. GRANDY, T. SEAN CRUMLISH, ROBERT ALLEN, REGENT INC. OF 15TH STREET d/b/a GIORGIO BRUTINI, LEGXPRESS, INC., PENNSYLVANIA SQUARE CORP., ANTHONY VINCIGUERRA, JOHN M. CORCORAN, SUNSHINE PERSONNEL, INC., ROYAL BANK OF PENNSYLVANIA, ROBERT J. ATLEE, C.W.D. ENTERPRISES, INC., d/b/a CHRIS' CAFE AND BAR, THE HAPPY ROOSTER, INC. and LINPRO PHILADELPHIA CENTER CITY OFFICE I, LTD.,

Petitioners,

vs.

ALGEMEEN BURGERLIJK PENSIOENFONDS,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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29 pp

QUESTIONS PRESENTED

Whether this Court should grant certiorari over an appeal raising fact-bound issues as to the interpretation of a statutory provision it clearly construed on several occasions, including in each of the last two terms.

Whether this Court should grant certiorari where the Third Circuit Court of Appeals simply applied the correct legal standard, as enunciated by the clear terms of the statute and recent decisions of this Court, and as uniformly recognized by other courts of appeals, to the facts as found by the district court after an extensive review of the record, to hold that respondent Algemeen Burgerlijk Pensioenfonds is immune from suit pursuant to the Foreign Sovereign Immunities Act.

Whether this Court should grant certiorari where petitioners essentially request that the Supreme Court review the district court's findings of fact.

LIST OF PARTIES

The parties to this proceeding include petitioners, as listed in the Petition for a Writ of Certiorari, and respondent, Algemeen Burgerlijk Pensioenfonds ("ABP"), the General Civil Pension Fund of the Netherlands.[1]

1. In compliance with Supreme Court Rule 29.1, the following subsidiaries of ABP are wholly-owned: Galgenwaard B.V., N.I.H. B.V., World Trade Center Amsterdam I B.V., Abp Vastgoed Holding B.V. and Beheersmaatschappij WTC.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Statement of Jurisdiction	1
Statement of the Case	1
Reasons for Denying the Writ	10
I. This Court has already conclusively interpreted the commercial activity exception.	11
II. The Third Circuit's decision is not inconsistent with decisions of other circuits.	12
III. The Third Circuit correctly interpreted the third clause of the FSIA and its conclusion is consistent with the plain language of the statute, with recent Supreme Court precedent and with decisions of other circuits.	14
IV. This Court should not grant certiorari to review the district court's factual findings.	18
V. Because the district court's findings were not clearly erroneous, the Third Circuit was correct to limit its review to those facts developed below.	20

Contents

Page

Conclusion 22

TABLE OF CITATIONS

Cases Cited:

Antares Aircraft v. Fed. Republic of Nigeria, 999 F.2d 33 (2d Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 878 (1994) 12, 13

Arriba Ltd. v. Petroleros Mexicanos, 962 F.2d 528 (5th Cir. 1992) 16

Bass v. Attardi, 868 F.2d 45 (3d Cir. 1989) 20

Clark v. K-Mart Corp., 979 F.2d 965 (3d Cir. 1992) 20

Federal Insurance Co. v. Richard I. Rubin & Co., Inc., Eastern District of Pennsylvania, Civil Action No. 92-4177 ..... 5, 7

Federal Insurance Co. v. Richard I. Rubin & Co., Inc., 12 F.3d 1270 (3d Cir. 1993) 7, 21

First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983) 8, 16, 17

Foremost-McKesson v. Islamic Republic of Iran, 905 F.2d 438 (D.C. Cir. 1990) 16

General Elec. Capital Corp. v. Grossman, 991 F.2d 1376 (8th Cir. 1993) 12, 13

Contents

Page

Gibbons v. Vdaras na Gaeltachta, 549 F. Supp. 1094 (S.D.N.Y. 1982) 12

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) 18

Hercaire Int'l, Inc. v. Argentina, 821 F.2d 559 (11th Cir. 1987) 16

Hester Int'l Corp. v. Fed. Republic of Nigeria, 879 F.2d 170 (5th Cir. 1989) 16

In re Capital Cities, 913 F.2d 89 (3d Cir. 1990) 20

Letelier v. Republic of Chile, 748 F.2d 790 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985) 16

Republic of Argentina v. Weltover, Inc., __ U.S. __, 112 S. Ct. 2160 (1992) 11, 15

Salve Regina College v. Russell, 499 U.S. 225 (1991) 18

Saudi Arabia v. Nelson, __ U.S. __, 113 S. Ct. 1471 (1993) 8, 11, 15

Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 1812 (1993) 12, 13

Texas Trading & Milling Corp. v. Fed. Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982) 12, 13, 14

Contents

Page

Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534 (11th Cir. 1993) 12, 13

Statutes Cited:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1330 3

28 U.S.C. § 1601-1611 1

28 U.S.C. § 1603 3

28 U.S.C. § 1605(a)(2) 4, 5

28 U.S.C. § 1605(a)(2)(5) 4

Rules Cited:

Supreme Court Rule 10 ..... 10, 14

Supreme Court Rule 10.1(a) 12

Other Authority Cited:

H. Rep. No. 1487, 94th Cong. 2d Sess. 29-30 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6628-29 17

STATEMENT OF JURISDICTION

On December 28, 1993, the Third Circuit Court of Appeals reversed and remanded the order of the United States District Court for the Eastern District of Pennsylvania in these actions and found, *inter alia*, that respondent ABP was immune from suit under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1601-1611 ("FSIA"). Petitioners seek to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

These consolidated actions represent a few of the over forty actions arising out of a fire that took place, on February 23, 1991, at the One Meridian Plaza Building (the "Building"), in Philadelphia, Pennsylvania.[2] In each of the actions arising out of the fire, the plaintiffs sought to recover for loss of life, personal injuries, property damage or economic losses that they claim resulted from the fire.

The first of the pending actions was commenced on or about March 1, 1991, virtually before the smoke cleared from the Building, in the Court of Common Pleas of Philadelphia County. Petitioners commenced several additional actions, seeking to recover, individually and on behalf of classes of entities they sought to represent,[3] for purported property damage and economic loss.

In support of their claims for relief, petitioners essentially

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2. All but these consolidated actions and one other action have since been settled.

3. On July 16, 1993, petitioners' Motion for Class Certification was denied.

alleged that the fire started through the spontaneous combustion of linseed oil which was negligently stored in the offices of one of the Building tenants. They asserted that it spread beyond the area of origin as a result of a combination of factors, including the failure of certain aspects of the Building's fire detection, alarm and suppression and other emergency equipment.

Petitioners sought to hold numerous parties responsible for the origin and spread of the fire, including E/R Associates, the owner of the Building, and Richard I. Rubin & Co., Inc., which was responsible for managing the Building. In this respect, petitioners specifically alleged in their Complaint that E/R Associates was a general partnership, consisting of Pan American Office Investments, Inc., The Equitable Life Assurance Society of the United States and USA One Associates, which was itself a partnership consisting of two Dutch corporations, USA One BV and USA Two BV.

Petitioners also named ABP as a defendant in these actions on the tenuous basis that it owned all of the stock of USA Holding BV, another Dutch corporation, which owns all of the stock of USA One BV and USA Two BV. Petitioners did not, and could not truthfully, allege that ABP owned the Building or was a partner in E/R Associates. Instead, they asserted, as they have throughout these cases and continue to assert in their Petition for a Writ of Certiorari, that ABP negotiated to acquire an interest in E/R Associates, created USA One BV and USA Two BV to make this investment and, thereafter, made crucial decisions about the operation of the Building.

ABP is the General Civil Pension Fund of the Dutch government, responsible for providing, *inter alia*, retirement and other benefits to those who fought in the resistance during World War II and to the civil servants of the Dutch government. It was created by an act of the Dutch Parliament as an agency of the Dutch

government, and there are no shares of stock or other certificates of ownership existing or contemplated in connection with ABP. It is governed by a Board of Trustees appointed by Royal Decree and maintains its principal place of business in the Netherlands.

Accordingly, ABP squarely meets the definition of an agency or instrumentality of the Dutch government, thereby qualifying as a foreign sovereign under the FSIA. 28 U.S.C. § 1603. As such, beginning on April 3, 1991, ABP removed each of the actions petitioners commenced to the United States District Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. §§ 1330 and 1441(d) (which respectively confer jurisdiction in the district courts over any actions commenced against a foreign sovereign and permit the removal of any such actions).[4]

Thereafter, several actions arising out of the fire were commenced directly in federal court on the basis of the court's subject matter jurisdiction over claims against ABP. Subsequent actions filed against ABP in state court were removed.

After the district court consolidated the instant actions, petitioners filed a Consolidated First Amended Class Action Complaint (the "First Complaint").[5] The defendants in these actions moved to dismiss the First Complaint on numerous substantive grounds. At the same time, ABP moved to dismiss on the grounds that as an agency or instrumentality of the Dutch government, it is immune from suit under the FSIA.

Petitioners responded to this Motion to Dismiss by asserting

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4. Defendants USA One BV and USA Two BV joined in these removals. Although these defendants are agencies or instrumentalities of a foreign sovereign, they have never contested jurisdiction or asserted an immunity defense in that this action is based upon their purported commercial activity.

5. On August 26, 1993, petitioners again amended their Complaint.

that both the commercial activity and non-commercial tort exceptions to the immunity created under the FSIA, 28 U.S.C. § 1605(a)(2) and (5), applied to ABP. Section 1605(a)(2) provides that:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —
>
> * * *
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

In support of this position, petitioners introduced deposition transcripts and documents which they contended demonstrate that USA Holding BV, USA One BV and USA Two BV are "paper subsidiaries" through which ABP controlled the operation and management of the Building. Based on these factual assertions, petitioners argued that ABP had waived its sovereign immunity.

ABP disputed these assertions contending that, while it did finance the acquisition of an interest in E/R Associates by USA One Associates, it did not acquire an interest in the Building or control the Building's operations. ABP created USA Holding BV, which formed USA One BV and USA Two BV. USA One Associates then acquired a sixty five percent interest in the Building in part with the proceeds of a loan from ABP.

While the aforesaid Motion to Dismiss was pending, ABP and USA Holding BV moved to dismiss the claims asserted against them in another action, *Federal Insurance Co. v. Richard I. Rubin & Co., Inc.*, Eastern District of Pennsylvania, Civil Action No. 92-4177, on the basis of their immunity from suit. Plaintiffs in the *Federal Insurance* case also opposed ABP's and USA Holding BV's Motion to Dismiss by arguing that ABP controlled the operation of the Building and submitted documents in support of such contention. The *Federal Insurance* plaintiffs asserted that the purported conduct constituted commercial activity sufficient to waive ABP's immunity from suit under the FSIA.

The district court decided the Motion to Dismiss in *Federal Insurance* first, denying ABP's and USA Holding BV's Motion. With the record developed in both the instant actions and in the *Federal Insurance* action before it, the district court initially held that ABP and USA Holding BV are agencies or instrumentalities of a foreign sovereign (Petitioners' Appendix ("Pet. App.") 126a). Furthermore, it expressly rejected the argument that ABP exercised undue control over USA Holding BV or that USA Holding BV exercised undue control over USA One BV and USA Two BV and refused to conclude that ABP or USA Holding BV actually directed the operation of the Building (Pet. App. 133a-134a). Nevertheless, it concluded that both of these foreign sovereigns waived their immunity from suit.

First, the district court held that USA Holding BV had waived its immunity from suit, pursuant to the first clause of the commercial activity exception, 28 U.S.C. § 1605(a)(2), simply by creating USA One BV and USA Two BV. The district court concluded that this constituted commercial activity in the United States, as the purpose of creating these corporations was to invest in real estate located here. The court reasoned that it was proper to hold USA Holding BV liable for the actions of USA One BV and USA Two BV on such a basis.

The court next found jurisdiction over ABP under the third clause of the FSIA's commercial activity exception as a result of ABP's extension of the arms-length loan to USA One Associates to finance its acquisition of an interest in the Building even though the Court recognized that the loan was executed pursuant to the laws of the Netherlands, and payments were made to ABP in the Netherlands in U.S. dollars (Pet. App. 122a, 132a).[6] The Court held that ABP's activity had a direct effect in the United States because USA One Associates' acquisition of an interest in the Building was an "immediate consequence" of the loan transaction (Pet. App. 132a-133a).

Alternatively, the court held that it would work a fraud or injustice to recognize the separate independent status of ABP and its wholly-owned subsidiary USA Holding BV, even though it affirmatively found that there was no principal-agency relationship between these entities and, further, that ABP's financing of the acquisition of the Building did not warrant a conclusion that the transaction was beyond the scope of normal corporate activities between parent and subsidiary (Pet. App. 133a-134a). The district court's decision was based solely upon the court's conclusion that permitting ABP to establish USA Holding BV without being held liable for the purported acts of USA Holding BV's subsidiaries would allow ABP to "circumvent its obligations for violations of the United States laws, while nevertheless reaping the benefits of investing in United States property." (Pet. App. 134a).

Thereafter, on April 16, 1993, the district court entered an

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6. There is no record evidence or factual finding below that ABP, in order to keep the payment of this loan current, attempted to implement policies in the Building or insisted that the Building's budget be spent in a certain way. Nor does the record below contain evidence that ABP was an owner or manager of the Building or that ABP was involved in the formulation or implementation of any policies at the Building.

Order and Memorandum Opinion in which it, *inter alia*, denied ABP's Motion to Dismiss petitioners' Complaint on jurisdictional grounds, incorporating by reference its Order and Memorandum Opinion in the *Federal Insurance* action (Pet. App. 117a). As it found that the commercial activity exception applied, the district court did not address petitioners' contention that the non-commercial tort exception also applied.

ABP and USA Holding BV appealed these decisions to the Third Circuit.[7] On appeal, ABP (and USA Holding BV) argued that based upon its findings of fact, the district court erred as a matter of law in its interpretation of the FSIA. In response, petitioners, recognizing that they could not prevail based upon the record established in the district court, argued that the Third Circuit should reverse the findings of fact below. Specifically, they argued that there was substantial evidence that ABP controlled the operation of the Building after USA One Associates acquired an interest therein and that the district court erred in rejecting their factual assertions.

On December 28, 1993, the Third Circuit Court of Appeals reversed. *See Federal Insurance Co. v. Richard I. Rubin & Co., Inc.*, 12 F.3d 1270 (3d Cir. 1993) (*See* Pet. App. 1a-47a). The Third Circuit first accepted the district court's findings of fact because they were not clearly erroneous. It then held that the facts found by the district court, as a matter of law, could not justify the conclusion that either ABP or USA Holding BV had engaged in commercial activity sufficient to warrant a finding that they had waived their sovereign immunity.

The Court of Appeals first applied the FSIA to USA Holding BV and then relied upon its conclusions as to USA Holding BV in

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7. The Third Circuit consolidated these appeals with the appeal in *Holcombe v. Richard I. Rubin & Co., Inc.*, another action arising out of the fire.

its determination of ABP's immunity. It found that the district court erred in attributing the commercial activities in the United States of USA One BV, USA Two BV and USA One Associates with respect to managing and operating the Building, to USA Holding BV. Specifically relying upon this Court's decision in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), and the unanimous authority of the Circuit Courts of Appeals applying *Bancec*, the Third Circuit held that the acts of separate juridical entities should not be attributed to related foreign entities unless one entity has been so extensively controlled by its owner that a relationship of principal and agent has been created, or to recognize their separate existence would work a fraud or injustice (Pet. App. 37a-38a). The Third Circuit concluded that, given the district court's affirmative factual finding that USA Holding BV did not exercise undue control over USA One BV and USA Two BV, and its failure to articulate any justification for the conclusion that it would work a fraud or injustice to recognize the separate corporate existence of USA One BV or USA Two BV, there was no basis for the district court's legal conclusion that the separate juridical status of these entities should be disregarded (Pet. App. 38a).

Moreover, relying upon this Court's unambiguous decision in *Saudi Arabia v. Nelson*, __ U.S. __, 113 S. Ct. 1471 (1993), the Third Circuit held that the single act of creating USA One BV and USA Two BV did not serve to waive USA Holding BV's immunity from suit under the first clause of the commercial activity exception (Pet. App. 38a). The Third Circuit held that the language of the statute and the *Nelson* decision clearly mandate that for the first clause of the commercial activity exception to apply in a specific action, not only must the foreign sovereign engage in commercial activity, but the action must be based upon that commercial activity. It concluded that petitioners could not satisfy this test because their Complaint was based upon the purported negligent operation of the Building and not the formation of USA One BV and USA Two BV.

In turn, with respect to ABP, the Court of Appeals rejected the district court's conclusion that it would work a fraud or injustice to recognize the separate juridical status of ABP, stating that:

> We must reject the District Court's second theory of jurisdiction [piercing the corporate veil from USA Holding BV to ABP] over ABP because we have already determined that on this record the Court erred as a matter of law in concluding that USA Holding [BV] relinquished its sovereign immunity.

(Pet. App. 42a).

The Third Circuit finally held that ABP's loan to USA One Associates could not, as a matter of law, be the basis for finding a waiver of ABP's sovereign immunity because there was no substantive nexus between the claims petitioners asserted with respect to the fire and the loan (Pet. App. 45a-46a). The Third Circuit held that the mere fact that the loan enabled USA One Associates to acquire an interest in the Building was an insufficient nexus between the claims asserted by petitioners and ABP's commercial activity.

The Third Circuit remanded to the district court for proceedings consistent with its opinion. As the district court had not ruled upon the applicability of the non-commercial tort exception, the Third Circuit held that it would be permitted to consider this issue on remand.

Once the matter was remanded, ABP and USA Holding BV renewed their request to dismiss the claims against them. The parties have briefed the applicability of the non-commercial tort exception and the matter is pending for decision by the district court.

Meanwhile, petitioners seek a petition for a writ of certiorari to review the Third Circuit's application of the third clause of the commercial activity exception to ABP. In their Petition, petitioners argue at length that ABP controlled the operation of the Building in order to maximize profits and thereby insure repayment of the loan. They claim that their action is accordingly based upon acts (directing the operation of the Building) in connection with a commercial activity (the loan) and, as such, the third clause of the commercial activity exception applies.

However, in order for this Court to accept petitioners' argument, it would have to reverse the district court's factual finding that ABP did not control the operation of the Building. Petitioners accordingly seek certiorari essentially to have this Court review such factual findings. This is not the type of issue appropriate for Supreme Court review.

REASONS FOR DENYING THE WRIT

Pursuant to Supreme Court Rule 10, a petition for a writ of certiorari will be granted only where there are "special and important" reasons. No such reasons exist in the instant matter.

Petitioners seek to convince the Supreme Court to revisit a well-settled area of law, which it interpreted twice in the last two terms. The language of the FSIA and this Court's recent decisions provide clear and unambiguous guidance as to how this statute should be applied. Indeed, there has been no disagreement among the circuits as to the interpretation of the commercial activity exception since the Court's most recent decisions.

This case does not raise issues of far-reaching significance or importance that warrant review by this Court because the Third Circuit opinion turns on the unique factual circumstances of the

case and the application of the court's statement of the law to those specific facts. The Third Circuit correctly applied the appropriate standard of review in examining this issue and in adopting the district court's findings of fact.

I.

THIS COURT HAS ALREADY CONCLUSIVELY INTERPRETED THE COMMERCIAL ACTIVITY EXCEPTION.

Given the number of cases and important issues facing this Court, a relevant factor in determining whether to grant certiorari should be the extent to which the Court has previously addressed the issues presented for review. In the instant proceedings, this Court has recently, and clearly, decided each of the issues petitioners seek to have reviewed.

The Court decided *Nelson* just last term, and in that case extensively analyzed the commercial activity exception to the FSIA and delineated the elements necessary to establish a waiver under the first clause of this section. While the *Nelson* Court did not address the second and third clauses of the commercial activity exception and did note that there may be a more tenuous nexus between the claims asserted and the commercial activity under those clauses, the extent of the nexus required under these clauses of the FSIA was addressed in *Republic of Argentina v. Weltover, Inc.*, __U.S.__, 112 S. Ct. 2160 (1992).

Weltover was a unanimous decision and eight Justices joined in the *Nelson* judgment. Together, these decisions provide clear guidance as to the interpretation of the commercial activity exception to the FSIA and leave no issues, relevant to this case, unresolved. This Court has clearly spoken on these issues, and it is

the duty of Circuit Courts of Appeals and District Courts to apply these holdings to the individual fact patterns with which they are presented. This is precisely what the Third Circuit did in the instant action.

Moreover, to the extent petitioners raise issues as to whether the Third Circuit properly held that ABP's separate juridical status should be respected, the Court addressed these issues in *Bancec.* Petitioners have not offered any reason for the Court to revisit this decision.

II.

THE THIRD CIRCUIT'S DECISION IS NOT INCONSISTENT WITH DECISIONS OF OTHER CIRCUITS.

Petitioners argue that this Court should issue a writ of certiorari because the Third Circuit's decision is allegedly inconsistent with decisions of other Circuit Courts of Appeal in *Vermeulen v. Renault, U.S.A., Inc.,* 985 F.2d 1534 (11th Cir. 1993); *Antares Aircraft v. Fed. Republic of Nigeria,* 999 F.2d 33 (2d Cir. 1993), *cert. denied,* __ U.S. __, 114 S. Ct. 878 (1994); *General Elec. Capital Corp. v. Grossman,* 991 F.2d 1376 (8th Cir. 1993); *Siderman de Blake v. Republic of Argentina,* 965 F.2d 699 (9th Cir. 1992), *cert. denied,* __ U.S. __, 113 S. Ct. 1812 (1993); and *Texas Trading & Milling Corp. v. Fed. Republic of Nigeria,* 647 F.2d 300 (2d Cir. 1981), *cert. denied,* 454 U.S. 1148 (1982).[8] In fact, the

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8. Petitioners also cite *Gibbons v. Udaras na Gaeltachta,* 549 F. Supp. 1094 (S.D.N.Y. 1982), in support of this assertion. However, *Gibbons* is a district court case. This Court does not grant certiorari for a conflict between a district court decision and a circuit court decision. *See* Supreme Court Rule 10.1(a).

courts in each of these cases interpreted the third clause of the commercial activity exception in the same manner as the Third Circuit.

In each instance, the courts recognized that there must be some substantive nexus between the claims asserted and the commercial activity in which the foreign sovereign is alleged to have engaged. The reason the courts found a waiver in those actions was that, under the facts presented, there was such a nexus. Indeed, in many of these cases, the plaintiff's claims were based upon the very commercial activity through which the foreign sovereign had waived its immunity, and the actual issue presented for appeal was whether there was a direct effect in the United States from this commercial activity.

For instance, in *Vermeulen,* the plaintiff was the owner of a Renault automobile and brought claims alleging the negligent design and manufacture of the 1982 LeCar passenger restraint system. *Vermeulen,* 985 at 1543. The Eleventh Circuit applied the third clause of the commercial activity exception to determine whether plaintiff's claims were acts performed in connection with a commercial activity of the defendant outside the United States and concluded that the design and manufacture of the LeCar "unquestionably were acts connected to a commercial activity . . . outside the United States." *Id.* at 1544. The *Vermeulen* court applied the same legal standard as did the Third Circuit, but a very different set of facts led it to reach an opposite conclusion.

Similarly, *Texas Trading, General Electric, Siderman* and *Antares Aircraft* are not applicable because each focused on the interpretation of the "direct effect" language of the third clause of the commercial activity exception. None of these cases contain an in-depth analysis as to whether the claims being sued upon were *based upon* acts performed in connection with commercial activity. However, the *Texas Trading* court addressed the "based

upon" language of the third clause of the commercial activity exception in a footnote. The court found that Nigeria's cement contracts and letters of credit qualified as commercial activity. *Texas Trading*, 647 F.2d at 310. With respect to the actions upon which the suit was based, namely the anticipatory repudiation of those cement contracts and letters of credit, the court had "little doubt" that these actions were based upon acts performed in connection with the defendants' commercial activity. *Id.* at 311 n.30. The factual scenario in *Texas Trading* offered the Second Circuit a clear causal link, but the Third Circuit could not have reached a similar conclusion given the findings of fact in this case.

A mere difference in result does not establish a conflict among the circuits under Supreme Court Rule 10. To satisfy this requirement, the Circuit Courts of Appeal must actually disagree as to the interpretation of what a statute means or what the substantive rule of law should be. There is no such divergence of opinion here.

III.

THE THIRD CIRCUIT CORRECTLY INTERPRETED THE THIRD CLAUSE OF THE FSIA AND ITS CONCLUSION IS CONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE, WITH RECENT SUPREME COURT PRECEDENT AND WITH DECISIONS OF OTHER CIRCUITS.

The Third Circuit correctly held that the district court erred in finding that it had subject matter jurisdiction over ABP under the third clause of the commercial activity exception because the claims alleged by petitioners were not "'based upon' acts performed 'in connection with' ABP's commercial activity." (Pet. App. 44a). The express language of the commercial activity exception demonstrates that the Third Circuit correctly held that

there must be a substantive connection between the claims asserted in the litigation and the commercial activity in question.

The clause in question specifically states that a foreign sovereign's immunity shall be waived in any case "in which the action is based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." While the litigation does not have to be based upon the commercial activity itself, it must be based upon an act undertaken in connection with this commercial activity. Moreover, this Court adopted this interpretation of the statute in *Weltover.*

In this respect, there is no basis for petitioners' contention that the Third Circuit applied the more stringent "based upon" standard rather than merely determining whether the act sued upon was performed "in connection with" a commercial activity. To the contrary, the Third Circuit accurately noted that this Court "did not describe the extent of a substantive connection required under the second and third clauses of the commercial activity exception in *Nelson* because the case raised an issue only under the first clause of the exception." (Pet. App. 44a-45a). It specifically addressed the *Nelson* dictum and acknowledged that the "in connection with" language of the third clause might allow for a more tenuous causal link between the claims alleged and the commercial activities than that required by the first clause (Pet. App. 44a). However, as the Third Circuit noted, neither *Nelson* nor *Weltover* "stand for the proposition that jurisdiction lies under the third clause of the FSIA commercial activity exception if the foreign state undertakes commercial activity outside the United States when the cause of action is not causally linked to the commercial activity." (Pet. App. 45a).

The Third Circuit also correctly concluded that there was no causal link, even under the more liberal standard of the third clause

of the commercial activity exception, between petitioners' claims and ABP's commercial activities. The only commercial activity that the district court found that ABP had engaged in was making the loan to USA One Associates and forming USA Holding BV. No one could reasonably contend that the alleged negligent operation of the Building is *based upon* any act *taken in connection* with those lending activities.

Similarly, the Third Circuit's conclusion that the acts of USA Holding BV, USA One BV and USA Two BV may not be attributed to ABP is consistent with the *Bancec* decision. *Bancec* clearly established that the separate juridical status of foreign sovereigns should be generally respected. Every Circuit Court of Appeals to have considered the issue has read *Bancec* as prohibiting the attribution of the activities of one agency or instrumentality of a foreign sovereign to another agency or instrumentality for purposes of determining whether it has engaged in commercial activity within the United States. *See Arriba Ltd. v. Petroleros Mexicanos,* 962 F.2d 528, 533-34 (5th Cir. 1992); *Foremost-McKesson v. Islamic Republic of Iran,* 905 F.2d 438, 447 (D.C. Cir. 1990); *Hester Int'l Corp. v. Fed. Republic of Nigeria,* 879 F.2d 170, 176 (5th Cir. 1989); *Hercaire Int'l, Inc. v. Argentina,* 821 F.2d 559, 565 (11th Cir. 1987); *Letelier v. Republic of Chile,* 748 F.2d 790, 795 (2d Cir. 1984), *cert. denied,* 471 U.S. 1125 (1985).

It is accordingly the exceptional case in which the acts of one foreign sovereign may be attributed to the other. *Bancec* established that this may occur only where: (1) the entity is so extensively controlled by its owner that a principal/agent relationship is created; or (2) to recognize the corporate form would work "fraud and injustice." 462 U.S. at 629. Once again, the factual findings of the district court preclude the conclusion that either exception applies here.

As noted previously, the district court found no evidence that

ABP exercised undue control over USA Holding BV, USA One BV or USA Two BV. Given this finding of fact, there is no basis to hold that a principal/agent relationship existed between ABP and any of these entities.

Petitioners' complaint that the Third Circuit erred in focusing only upon ABP's relationship to USA Holding BV is without basis. The record precludes a finding that ABP controlled any of these entities. Moreover, USA One BV and USA Two BV are not even ABP's subsidiaries. As such, it was proper for the Third Circuit to conclude that it was not necessary to address this issue with respect to ABP because the court had already found that there was no jurisdiction over USA Holding BV, the parent of USA One BV and USA Two BV.

The district court failed to find any facts to demonstrate that it would work a fraud or injustice to recognize the separate juridical status of ABP. Indeed, the district court's conclusion was inconsistent with *Bancec's* admonition that the independent status of foreign sovereigns must be respected. It was also inconsistent with the statement in the legislative history of the FSIA that:

> If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary.

H. Rep. No. 1487, 94th Cong. 2d Sess. 29-30 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6628-29.

IV.

THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE DISTRICT COURT'S FACTUAL FINDINGS.

Petitioners' real complaint is with the district court because it found that the commercial activity in which ABP engaged was the loan transaction as opposed to the ownership, operation and/or management of the Building.[9] Petitioners' entire argument that their claims arise out of acts undertaken in connection with ABP's commercial activity and that ABP exercised undue control over USA Holding BV, USA One BV and USA Two BV rests upon their assertion that ABP directed the manner in which the Building should be operated.

The fundamental flaw with petitioners' attempt to obtain a writ of certiorari with respect to these issues is that this Court does not, and should not, accept an appeal simply to review district court findings of fact. Courts of Appeals should devote their primary attention to legal issues, with the record having been constructed below and settled for purposes of the appeal. *Salve Regina College v. Russell,* 499 U.S. 225, 232 (1991). This principle is even more appropriate with respect to this Court. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987) (Court reluctant to examine record where both courts below agreed on facts). Moreover, findings of fact are subject to a clearly erroneous standard of review and, thus, it is the rare instance in which they will be reversed. This Court's precious resources should not be wasted

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9. Petitioners devote a substantial portion of their Statement of the Case to detailing ABP's involvement in negotiations leading up to USA One Associates' acquisition of an interest in E/R Associates, the owner of the Building. *See, e.g.*, Petition for a Writ of Certiorari at 6-8. The district court did not accept these alleged preacquisition activities as a basis for any of petitioners' direct damage claims.

upon a review of issues in which it is likely to have so little impact.

While this Court should not even consider petitioners' factual arguments, it is noted that these arguments are completely without basis. This is illustrated by the fact that petitioners' Statement of the Case contains no record citations whatsoever. In fact, petitioners' entire Statement of the Case consists of either statements that find no support in the record, distortions of the testimony of record or misleading or incomplete recitations of the evidence.

For example, on the issue of whether ABP unduly controlled USA Holding BV, USA One BV and USA Two BV, ABP submitted extensive evidence that all corporate formalities were followed with respect to these entities, they were adequately capitalized (with for instance thirty million dollars in capital being contributed initially to USA One BV and USA Two BV) and maintained their own books and records and bank accounts. Petitioners did not and cannot controvert such evidence. They have argued that the fact that USA One BV and USA Two BV did not have a Board of Directors (Petition for a Writ of Certiorari at 8), must mean that they are sham subsidiaries. In doing so, they failed to recognize or acknowledge that these corporations are organized under the laws of the Netherlands, and Dutch corporations do not have boards of directors. Instead, they have managing directors, and both USA One BV and USA Two BV had the appropriate number of managing directors.

Similarly, there is no evidence in the record of any actions ABP took with respect to the management of the Building. Once again, as an illustration, it is a flat misstatement for petitioners to assert that, after USA One Associates acquired an interest in the Building, ABP engaged Rodin Investment Administration Company ("Rodin") to manage this investment. The record is clear, and the district court expressly found, that USA One Associates, not ABP, engaged Rodin (Pet. App. 122a).

Indeed, the record demonstrates that neither the actual owner of the Building (E/R Associates), its partners (USA One Associates, The Equitable Life Assurance Society of the United States and Pan American Office Investments, Inc.) or the managers of the Building intentionally or negligently violated any fire code provisions or knew or should have known of any defects in the fire detection, alarm and suppression equipment or other life safety equipment. They engaged licensed and qualified independent contractors to install, repair and inspect all necessary equipment, and, in fact, on the night of the fire, the Building exceeded code requirements. The isolated failures of the fire detection, alarm and suppression equipment were the result of the negligence of the independent contractors.

V.

BECAUSE THE DISTRICT COURT'S FINDINGS WERE NOT CLEARLY ERRONEOUS, THE THIRD CIRCUIT WAS CORRECT TO LIMIT ITS REVIEW TO THOSE FACTS DEVELOPED BELOW.

Finally, petitioners insist that the Third Circuit committed "grave error" by not considering certain evidence of ABP's alleged commercial actions in the United States (Pet. App. 26a). This argument is refuted by well-established case law stating that the circuit court is limited in its review to those facts developed in the district court. *See, e.g., Clark v. K-Mart Corp.*, 979 F.2d 965, 967 (3d Cir. 1992) (en banc); *In re Capital Cities*, 913 F.2d 89, 96 (3d Cir. 1990); *Bass v. Attardi*, 868 F.2d 45, 51 (3d Cir. 1989) (per curiam).

Thus, it is not the duty of an appellate court to make evidentiary determinations, and the Third Circuit, in its opinion, correctly stated that this case presents no reason to create an exception to the rule that the "only proper function of a court of

appeals is to review the decision below on the basis of the record that was before the district court. [citation omitted]" (Pet. App. 31a).

Petitioners were given ample opportunity to conduct discovery and submit whatever evidentiary materials they believed were appropriate in responding to ABP's Motion to Dismiss. If they did not provide materials to the district court, that is their own fault for which they must bear responsibility.

Petitioners also take issue with the district court's reliance on its findings of fact in the *Federal Insurance* action. However, the court had all of the arguments, testimony and documents submitted by petitioners as well as the plaintiffs in the *Federal Insurance* action before it when it made its findings of fact.

There was ample support in the record for these findings. Accordingly, the Third Circuit properly concluded that they were not clearly erroneous and based its decision upon the facts as determined by the district court. Even if this Court were to grant certiorari, which it should not, it could properly do nothing different.

CONCLUSION

The Third Circuit Court of Appeals was correct in ruling that ABP is immune from suit under the FSIA. The Third Circuit's interpretation of the third clause of the commercial activity exception is consistent with the plain language of the statute and with Supreme Court precedent. Furthermore, the decision is not in conflict with other courts of appeals, but instead is supported by other authority. The Third Circuit also correctly adhered to the legal principles regarding the separate juridical status of ABP. Finally, the Third Circuit was correct in limiting its review of the record to those facts developed by the district court. For these reasons and those set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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